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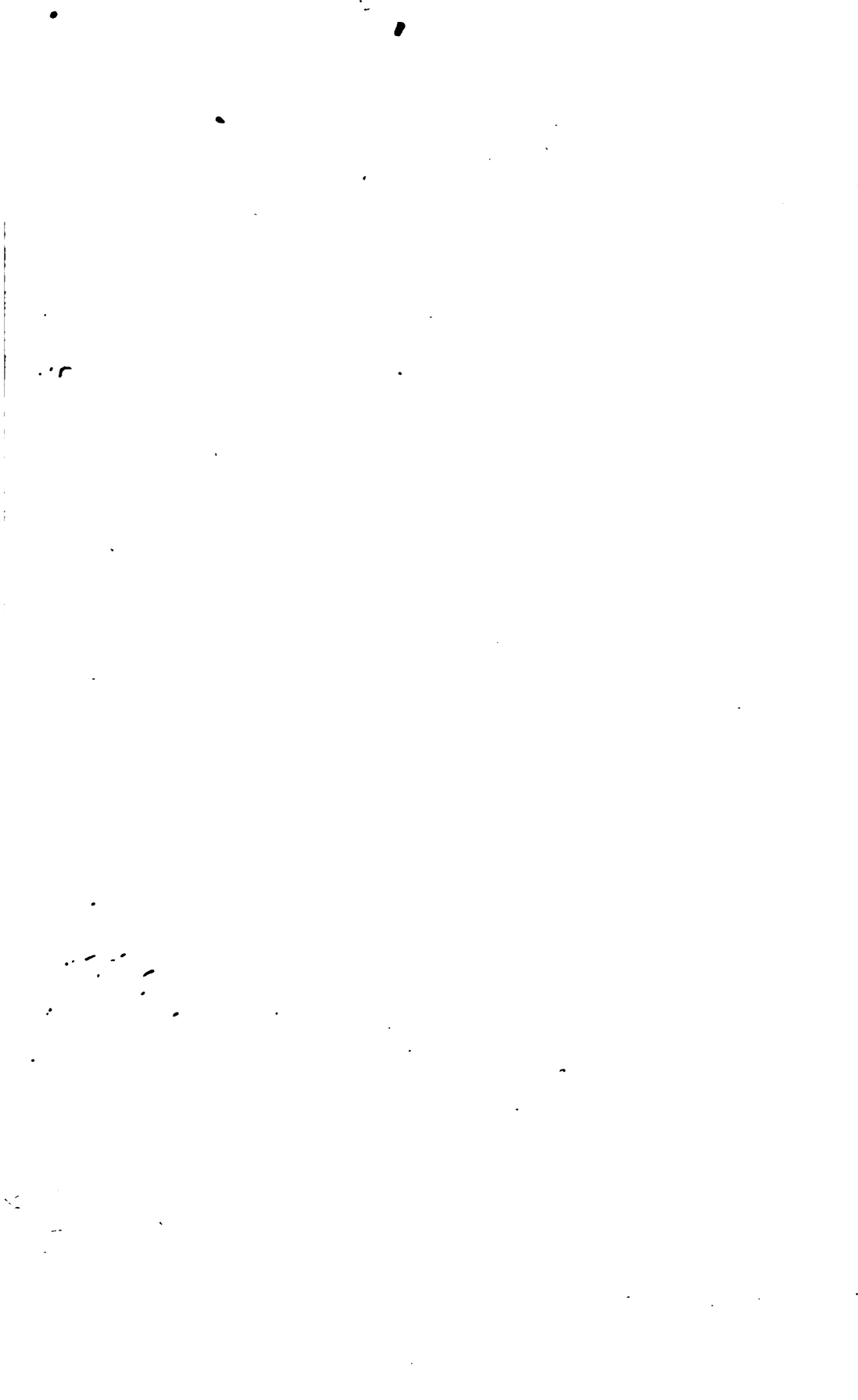
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Cases

HEARD AND DETERMINED

IN

HER MAJESTY'S SUPREME COURT

OF THE

Straits Settlements

Supreme Court
1808—1884.

EDITED AND REPORTED

[WITH A JUDICIAL-HISTORICAL PREFACE FROM 1786 TO 1885.]

BY

JAMES WILLIAM NORTON KYSHE, ESQ.,

ACTING REGISTRAR OF THE SAID COURT IN MALACCA.

Law is beneficence acting by rule.
Burke.

IN THREE VOLUMES.

VOL. I.

CIVIL CASES.

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1885.

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TO
HIS HONOR
SIR THOMAS SIDGREAVES, KNT..

Chief Justice of the Straits Settlements, &c., &c., &c.

This Work

IS, WITH PERMISSION,

RESPECTFULLY DEDICATED

BY

THE AUTHOR.

PREFACE.

[JUDICIAL—HISTORICAL]

1786—1885.

A GREAT drawback, and indeed considerable inconvenience has heretofore been experienced, owing to the want of a complete, and above all, reliable report of all the important and binding cases adjudicated upon in the Superior Court of this Colony.* The utility of a work like the present in its objects, need not therefore be insisted upon. As far back as August 1858, one of the most able of the late learned Recorders in the Straits, "regretted that the Recorders did not preserve their judgments "by publishing them."† In 1869, in a short pamphlet-form, appeared some few cases, styled *Oriental Cases*, compiled by an Attorney of the Court, Mr. R. Carr Woods, jr., and in 1877, a large collection of mostly early cases, was also printed and published,‡ but apart from these collections, made up of decisions which had mostly appeared in the public press from time to time, no regular reporting of cases from the Court Records, has ever existed. Throughout these Volumes will now appear for the first time, a very large number of cases that have never before appeared in print, and which have been cast from the earliest records, the majority of which have been extracted from a voluminous mass of varied Court Records, and the Note Books—as still exist,—of the different Recorders and Judges of the Colony,

* "It is often very difficult to determine whether or no a decision has ceased to be a binding authority: our judges in the present day seldom expressly overrule a previous decision; they comment on it, distinguish it, explain it away, and then leave it with its lustre tarnished, but still apparently a binding authority, should identically the same facts recur." *Olgers*, Digest of the Law of Libel and Slander, 1881, page vi.

† ".....Upon a question on which the cases decided by the Superior Courts at home, cannot give much assistance, since its determination depends in great measure on local circumstances, I think it is to be regretted that the Recorders did not preserve their judgments by publishing them.....This absence of published judgments is, as I have just said, to be regretted, because much uncertainty will continue to hang over the Administration of Justice in the Settlement. Each Recorder must begin *de novo*, and solve for himself, as best he may, the question whether this or that Statute is in force here; and the law will fluctuate according as he unconsciously departs from the views of his predecessors, and as his views, again are, in similar unconsciousness, departed from by his successors." *Sir Benson Maxwell*, Journal Indian Archipelago, vol. iii., part i., p. 59.

‡ *Straits Law Reports*, compiled by S. Leicester, Chief Clerk to the Magistrates of Police, 1877.

to which I have had unlimited access, and which now, after over three years painstaking care and patience, and when other avocations would permit, I have succeeded in putting together. Any attempt at a work of this kind, would have been of little value, without a careful examination of each case, as filed in the Registrar's Office, with the notes of the Judges, as well as with the Minute Books of the Registrars, and this, wherever possible, has been invariably done, *and it is on the authority of those records, that the majority of the cases reported herein, are now given.*

The plan adopted by me, is that followed at home, and my care throughout, has been to condense matters in a manner as concise as could consistently be done. The arguments of Counsel, and the judgments, wherever practicable, are stated in full, and with the greatest regard to accuracy; and I have been particularly anxious in reporting the decisions of the Judges, to follow, as nearly as possible, the very words of the Court in expressing its opinion, as borne out by the notes. Cases of a similar nature, or points raised in one case, and already decided in another, or matters having any connection whatever, will all be found connected, by annotations and foot-notes,—this I trust, will further add to the utility and usefulness of the work.

Having thus far explained the purport of this work,—and in conjunction with it, as coming within the range of its immediate scope,—it will not be thought out of place for me to give here, an historical account of the Administration of Justice in this Colony, from the time of its first establishment in 1786, when Prince of Wales' Island [so named by Captain Light, an officer of the Bengal Government, *on taking over the Settlement, and by which name it is still officially known], or Penang, as it is called after its original native name, was first ceded to the East India Company by the Rajah of Quedah.† But before proceeding any further, I think it but right, that I should guard myself against any supposition that I am the first to have ever touched upon this or any matter in connection with the history of these parts, for several writers, and that long before my time, have ably dwelt upon portions of what will appear herein, but having had at my disposal,—apart from researches made from divers authors and records,—documents of a most authentic and unquestionable nature, this Judicial-Historical Preface has been almost entirely founded thereon,—which documents are to be found in the Registry of the Supreme Court in Penang,—for owing to the constitution of the Government in olden days, that office formed a depository of some of the most valuable public documents, especially, built as is the Penang branch of the Supreme Court, upon the very first Court of Justice established in the Colony.

* Previously a "Navigating Merchant." *Journal Indian Archipelago*, vol. iii., 1849, p. 600.

† This is more properly spelt *Kedah*, but for the sake of uniformity, the word being spelt as above in the different cases reported, it is here retained.

CHAPTER I.

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1786—1800.

Foundation of Penang—Captain Light, first Superintendent—Difficulties regarding Administration of Justice—Lord Cornwallis' despatch—Trial by Court-Martial—Native headmen—Charge against one John Sudds for Murder—Attorney-General Burroughs' opinion on the case—Captain Light's despatch—Thomas Pigou, Magistrate—Lord Teignmouth's reply to Captain Light—forwards some written proclamations and regulations—Captain Light's death—Pigou temporarily succeeds him—Philip Manington, Magistrate—his arrival—he assumes the reins of the Government—Doubts regarding date of Captain Light's death—Quedah—Penang and its cession—Manington proceeds to India where he dies—Pigou and one Beanland temporarily succeed him—Arrival of Major McDonald as Superintendent—Committee appointed by him—Their report and recommendation—Major McDonald's despatch—Europeans—Native headmen—their powers—Government Establishment—Cause Book—Court papers—George Caunter, Magistrate—Philip Manington, Jr., "2nd Assistant"—Magistrate and 2nd Assistant take bench in turn—Superintendent no power to carry out sentence of death—Decisions of Magistrates submitted to him before being carried out—Case of adultery: Aphoe and Kehim—Sentence—Departure of Major McDonald—Caunter acts for him—Duke of Wellington's Memorandum on Pulo Penang—his recommendations regarding the Administration of Justice—Native laws followed—illustration—Divorce case Inche Lebedrecha, tried by Manington—Death of Major McDonald—Native laws and usages.

Penang was the first British Settlement in the Straits of Malacca. When first taken possession of, the place was practically uninhabited, there being but a few itinerant fishermen living on it.* It might naturally be supposed therefore, that the Island, on being taken over, became *de facto* an English Settlement, and that consequently our own laws prevailed, although it was long after, that this was really acknowledged. † Captain Light, the first Governor, or Superintendent, as the head of the Government was then styled, experienced no end of difficulty in providing for the establishment of a Court of Justice. The first time he touched upon the point, was on his return to Bengal, after his successful mission to the King of Quedah,—[he having previously been deputed to find an emporium for our trade in these seas],—in a letter dated 6th April, 1786, to the Governor-General of India in Council, wherein he stated that people would come from different specified places, and that it would be necessary, *inter alia* "to establish a police for their protection."‡ In 1786, after the Island

LIGHT.
1786-1794.

* Opinions differ about this, the Charter of 25th March 1807, however says "wholly uninhabited."

† See *Regina v. Willans*, Magistrates' Appeals, vol. iii. of these Reports.

‡ This is slightly touched upon by Mr. Phillips, in § 7 of his Minute on the Landed Tenures of Prince of Wales' Island. [See *Papers and Correspondence—Land Revenue Administration*, lately published by Hon'ble W. E. Maxwell, 1884, p. 2.]

LIGHT.
—
1786-1794.

had been taken over on the 11th of August of that year,* Captain Light again addressed Lord Cornwallis on the subject. In answer to his representations, he was informed by order of the Governor-General in Council, dated 26th January, 1788, that the "Council did not think themselves at liberty to make any permanent regulations for the Police at Prince of Wales' Island, without express authority from Europe," and "until that authority arrives," the order went on to say, "it must remain with you, [the Superintendent of the Island], to preserve good order in the Settlement as well as you can, by imprisonment or other common punishments, so far as the inhabitants *not British subjects*, are concerned; and excepting in cases of murder: in cases of this kind, the Governor-General in Council, is compelled to determine on the least exceptionable means of punishing them, and with this view, you are authorized to assemble a Court-Martial consisting of not less than five members, to be composed of Officers of the Army, and of the most respectable inhabitants to try and judge all persons, not British subjects, charged with murder,—their authority however, not to extend to carrying the sentence into execution without the approval of it by the Commander-in-Chief, and during this reference, the parties are to remain in a state of confinement measured in its degree of strictness by the circumstances under which they are accused." The population increased gradually, and some of the natives claimed the administration of their own laws. The expediency of committing the Administration of Justice in each class to a head-man, was therefore decided upon,† and Captain Light in a letter dated 30th July, 1792, after touching upon this subject, and setting out the condition and prospects of the Island, informed the Governor-General that he had appointed "*Hakims* or notaries to keep Registers of Marriages, Births, Slaves, Sales of Lands and Houses, which, however imperfect, would by degrees become regular and prevent much litigation."

In 1793, the records disclose a very serious case against a European named *John Sudds*, who was charged with the murder of one *Smithers*. The matter was duly enquired into, on the 2nd July, 1793, at Fort Cornwallis, by two military officers,‡ appointed for that purpose by Captain Light, and the man found guilty of the offence. The prisoner was detained in custody until the 30th September, 1793, when he was sent to Calcutta for trial, but there discharged soon after, there being primarily no jurisdiction to deal with him. The Attorney-General of Calcutta [Sir W. Burroughs, Bt.], who had been referred to for his opinion of the case, in a letter dated 26th September, 1793, informed the Secretary to the Government of India, that apart from the irregularity of the whole of the proceedings, there was no evidence to support the charge and

* For Proclamation, see *Fatimah & ors. v. Logan & ors.*, *infra*, p. 259.

† Captain Light passed certain Regulations for the guidance of Native Chiefs, which were reformed in 1800, by Sir George Leith, Lieut.-Gov., see *infra*, chap. 2.

‡ One of them Lieut. Norman Macalister, Colonel and Governor at the Proclamation of the first Charter in 1808.

"no law by which the well meant directions given to the Superintendent of Prince of Wales' Island could be supported, as far as they related to the trial or punishment of murder or any other crimes at that island....."*

LIGHT.
1786-1794.

On the 25th January, 1794, Captain Light again addressed the Board of Directors as to the state and different requirements of the Island, and said that "from the present populousness of the Settlement, and the daily increase of the inhabitants, circumstances repeatedly occur to shew the necessity of establishing a more regular form of government than exists at present, under the sole administration of one person. From the great number of strangers constantly coming and going, a strict police is essentially requisite. From the great diversity of inhabitants, differing in religion, laws, language and customs, a constant and patient attention to their various complaints must be afforded....." He then recommended the separation of the judicial from the executive office, and went on to say: "To endeavour to subject these people to our strict military law and discipline, will soon depopulate the island of all the most wealthy and useful inhabitants. A mild, and at the same time an active government, is necessary. The inhabitants must at all times have recourse with the Chief, and as they are composed of many different nations, they are jealous of each other and will not submit their cause to the decision of one whom they think is a partial administrator. The Administration of Justice will therefore for some years continue to be a troublesome and fatiguing office, which makes it necessary that the person who is to execute the duties of it should be acquainted with persons and circumstances before he enters upon it," and ended by asking for "a regular form for administering justice," as necessary "both for the peace and welfare of the society, and for the honor of the nation who have granted them protection."† The records at this time shew that a Mr. Thomas Pigou, styled "Assistant to Captain Light," acted as a Magistrate in the Island, though it is unknown by what law he was guided. Captain Light's recommendations seem to have met but with little consideration. On the 1st of August, 1794, Lord Teignmouth, then Governor-General in Council, informed him, that he did not then think himself authorized to establish formal and regular Courts for the trial and punishment of offenders, but in conformity with Lord Cornwallis' opinion, recorded on the 26th January, 1788, he, Lord Teignmouth, had passed certain Regulations for preserving the peace of the Island. Some *written* proclamations and regulations, were thereupon sent to Captain Light, and these, until the proclamation of the first Charter in 1808, were supposed to constitute the *lex loci*, but as a fact, whether found impracticable or otherwise, seem to have been but very rarely acted upon. A Mr. Philip Manington, was also about this time, appointed Magistrate in the Island, by the Govern-

* See *Jour. Ind. Arch.*, vol. 5, p. 5. This case is also alluded to by Sir Benson Maxwell, in *Reg. v. Willans*, Magistrates' Appeals, vol. iii. of these Reports.

† *Jour. Ind. Arch.*, vol. 5, 1851, p. 7.

PIGOU.
1794.
MANINGTON.
1794-1795.
BEANLAND.
1896
MCDONALD.
1796-1797.

ment of India. He arrived here in November 1794,* Captain Light had died about a month previously. Some time before, and after Captain Light's death,† Mr. Pigou, his assistant, acted for a short time as Superintendent, until the arrival as above-mentioned, of Mr. Manington, who, at once, assumed the reins of the Government of the Island, but "was obliged in a few months, owing to the "bad state of his health, to resign, and proceeded to Bengal, "where he died."‡ He was temporarily succeeded by Mr. Pigou, and from January 1796 by a "Mr. John Beanland," until the arrival on the 14th May, 1796, of Major Forbes Ross McDonald, an officer of the Bengal Government, who had been appointed to replace Captain Light. On his arrival, Major McDonald, appointed a Committee to enquire into and report upon matters connected with the local administration. This Committee, in its report, made certain allusions to "the absence of a Court of Law, and the sub-

* Exact date not found.

† The exact date of the death of Captain Light, [whose Will is to be found among the records of the Court, and which destroys the fiction that he had married a daughter of the King of Quedah,¶] seems to have been doubted by many,§ but the following extract of a letter, [a copy of which is among the records of the Court], from two of his Executors, to a co-Executor, announcing his death, clearly gives the correct date:

PRINCE OF WALES' ISLAND,
21st October, 1794.

"To

WILLIAM FAIRLIE, Esq.,

Calcutta.

DEAR SIR,

It is with great concern we have to advise you of the distressing loss we have experienced in the death of our worthy friend Mr. Light, who departed this life this morning at one o'clock, after an illness of a pretty long duration, but which in the latter part of it, made a very rapid progress,.....

This event, distressing as it would have been at any time, is peculiarly so just at this moment for a variety of reasons, all which must strike you very forcibly without our particularizing them.....

[Sd.] J. SCOTT,
[„] THOMAS PIGOU."

¶ "Captain Light had assisted the above prince [King of Quedah] in quelling some troubles in his dominions, who in return, bestowed on him a princess of his blood in marriage, together with this island as her dowry.....this, however, is certain, that the Island of Pulo Peenang, which was given with her in dowry, he, as subject of Great Britain, took possession of in the name of his Britannick Majesty, for the use of the English East-India Company." *A short account of the Prince of Wales's Island or Pulo Peenang*, Elisha Trapaud, Esqre., Captain in the Engineer Corps, Madras Establishment, London, 1738, p. 9, 15,—but see *early treaties*!!

§ "1793.—Captain Light died about the latter part of this year"—*Jour. Ind. Arch.*, Vol. 3, 1849, p. 614,—again—"This Gentleman [Francis Light] died during the year 1794, but there is no record of the event to be found....." and again "the date of Captain Light's death, and the name of his immediate successor, are not discoverable from the records." *Jour. Ind. Arch.*, 1851, Vol. 5, No. 1, p. 6. The Ecclesiastical papers connected with Light's estate, only shew that he died in the month of October, 1794, without specifying any date—[*Martinha Rozells alias Timmer v. W. E. Phillips & ors.*,—claim of restoration of certain lands under the Will of Francis Light, deceased, 30th March, 1811. "The defendant W. E. P. saith that the said Francis Light departed this life sometime on or about the 24th day of October 1794....."]"

† *A short account of the Settlement of Prince of Wales Island*, Sir Geo. Leith Bt., Lieut.-Governor, London, 1804, p. 7.

"jection of the inhabitants to trial by Court- Martial, which had deterred numerous people from settling here.....that pending the appointment of such a Court, a Magistrate be appointed,a man of accommodating manners, mild temper and experience." In July 1796, in forwarding this report to the Government of India, Major McDonald remarked as follows, in regard to that portion referring to the Administration of Justice.

McDONALD.
1796-1797.

"Each language, in imitation of those under the Dutch Government, have had a Captain or head-man appointed over it, to administer justice in all cases not requiring an appeal to higher powers, to keep registers and regulate the Police of their districts. The men whom I found in office, have to a man proved unworthy of their trust. I long hesitated to make any alterations, judging it preferable to deprive myself of the assistance which that class of police officers might afford, than to hazard a nomination which from ignorance, self-interest or favor, might recommend to the prejudice of the general good"

The Europeans had, apparently, at this period, become very obstreperous, no power was vested in the Government, under the Regulations of 1794 over the property of British subjects,* and the latter in other matters only acquiesced in such decisions of the Superintendent or Magistrate, as met with their own views.†

Major McDonald, in his despatch, went on to say :

"..... But I have derived a benefit from the sacrifice, in a great measure balancing its inconvenience.....I have made myself acquainted with the people, their modes and sentiments. I am persuaded I have gained their confidence, although I may perhaps owe much of that to the fiery ordeal through which I have persevered, not seldom in their defence, administered to me by the European settlers, who affected to hold in contempt such feeble and as they argued, not believed, upstart control..... To the Europeans alone, to their interested motives, to their spirit of insubordination must be attributed the general laxity of every department, for where could vigour, where could with propriety any restrictive regulation operate, while the most conspicuous part of the community not only holds itself sanctioned, but preaches up publicly a crusade against all Government..... Police we have none, at least no regulation which deserves that epithet—various regulations have been made from time to time, as urgency in particular cases dictated, but they have all shared the same fate, neglect where every member of the community is not bound by the same law, where to carry into effect a necessary arrangement, a mandate is issued to one class, while a request hazards a contemptuous reception from the other....."

Major McDonald continued in practice the same system as that inaugurated by his predecessor, in appointing head-men to each class and framing regulations, in the shape of instructions, for the Administration of Justice and other purposes. The powers of the native head-men, or captains as they were styled, were however limited; their civil jurisdiction not exceeding demands over ten dollars, the more serious or important cases being adjudicated by the regular magistracy. At this time, the Government establishment consisted principally of 3 officials styled "Superintendent," "Magistrate," and "2nd Assistant." The first Cause Book now on record, bearing date 3rd January 1797,

* *Fenwick v. G. Caunter*, 28th Sept., 1808, [not reported]—and see time of Sir George Leith, Bt.,—1800-1803 and his "account of the Settlement," *in* *frd.* Chap. 2.

† See §§. 89 & 93 of Governor Dundas' despatch of 12th Nov., 1805, and §. 7 of Mr. Dickens' letter of 21st Dec. 1806 to Mr. Raffles, regarding one Douglas—Chap. 3, *in* *frd.*

McDONALD.
1796-1797.

[and which is still in good preservation, and contains a transcript of the papers in the cases heard,—a system which was carried out until the foundation of the Court of Judicature in 1808], gives Major McDonald as the Superintendent, a Mr. George Caunter as Magistrate, and Mr. Philip Manington [apparently a son of the first-named Manington*] as “2nd Assistant.” The records nowhere shew when or by whom Mr. Caunter was appointed, or when he arrived in Penang. The Magistrate and 2nd Assistant took the bench in turn, and never sat together, except in capital cases, when the Superintendent also sat, as President. The Superintendent had however, as before stated,† no power to carry out a sentence of death, without the previous sanction of the Governor-General of India being obtained, all the proceedings in such cases, being sent to him.‡

In accordance with a Regulation passed by the Government of India, dated 31st August, 1794, the decisions of the Magistrates, were submitted to the Superintendent before they could be acted upon, and this system appears to have been followed out till the establishment of the Court of Judicature in 1808. The decision when approved of, was carried out by the Magistrate who passed the order.

The following will illustrate the nature of punishments awarded in those days for criminal offences.

Before George Caunter, Magistrate.

27th April 1797,

Aphoe, a Chinaman, and Kehim, a Chinese woman, for adultery.

.....

Sentence.

To have their heads shaved, and stand twice in the Pillory from the hour of 4 to 6 in the evening, and the man to be imprisoned, until an opportunity offers of sending him off the Island.

GEORGE CAUNTER.

Approved.

F. B. McDONALD.

CAUNTER.
1797-1800.

Major McDonald left for India on the 8th of September, 1797, when he was succeeded by Mr. Caunter as acting Superintendent, Mr. Manington succeeding Mr. Caunter as “Magistrate.”

It was about this period, that the Duke of Wellington, then Colonel Wellesley, drew up his famous “*Memorandum on Pulo “Penang,”*” || when in command of the 33rd. Regiment, which formed part of an expedition destined for the capture of Manila, and which met in Penang in September, 1797. After expressing his

* “The son of the Superintendent Manington”—*Papers and Correspondence, Land Revenue Admin.*, 1823—1837, [published 1884] p. 29.

† Lord Cornwallis’ Despatch to Captain Light, 26th Jan. 1788, *antè* p. IV.

‡ As to the result of this in subsequent years, see § 92 of Governor Dundas’ despatch of 12th November, 1805, *infra*—Chap. 3. See also Sir George Leith’s *Account of the Settlement, 1800-1803—infra*, Ch. 2.

|| “The Wellington despatches” [Supplementary Despatches], Vol. I., p. 25.

opinion as to the importance of Penang as a military station, and “therefore a most desirable place to retain,” and making suggestions as to “the means of paying for its defence,” Colonel Wellesley concluded with “a few remarks for the “measures to be adopted for the police of the Island and “for the security of its property.” As will be seen, his recommendations embodied suggestions already made and partly carried out by Captain Light and Major McDonald. He said :

CAUNTER.
1797—1800.

“As the inhabitants consist of people of different nations and of different Provinces of those nations, it is advisable to leave them under the direction of the head-man of each Province, and to interfere as little as possible in the regulations which may be established by each for the government of his own countryman. It may, however, be necessary in order to insure the general tranquillity, to have one European Magistrate, who might be at the head of the magistracy of the Island. He should inform himself of the methods of proceeding, and of the laws which bind the Chinese and the Malays, and in cases where either or both are parties, according to the laws of “universal and natural justice.”*

As an illustration of how native laws were followed in early days, the following decision of Mr. Manington, in an application for divorce, is here given :

18th October 1797.

Before Philip Manington, Esquire,

Acting Magistrate.

In the matter of Inche Lebedrecha.

Inche Lebedrecha sues for a divorce from her husband. She relates that about five years ago when she lived at Hassahan, her husband Lebby Byun, left her to go to Rumbow, near Malacca, since which he has never returned, or had she ever heard of him until about a year ago, when she was informed, that her husband had married another woman at Rumbow,—on which she came here, and has been here resident on the Island two months. She now has no subsistence to live upon, and therefore sues for a divorce that she may be enabled

* See §§. 16 & 17 of the *Instructions* to Sir George Leith, Bt., 15th March, 1800, *infra*—Ch. 2, and time of *Dickens, J. & M.*, 1801-1808—*infra*.

CAUNTER. to marry again.
1797—1800.

DECISION.

It seems from enquiry of the different Chiefs and Priests, that the Malay Laws say, if the husband leaves his wife, and leaves her no means of getting a maintenance during her absence, or that he should not return to her or she not hearing any tidings of him in the expiration of one year, that then she can marry again, it is therefore decreed that should the husband not return, during the space of twelve months, from this date, she be divorced and may marry again.

Approved.

P. MANINGTON,

G. CAUNTER.

Acting Magistrate.

The Records of the Court do not shew that Major McDonald returned to the Island again, although he is supposed to have done so late in 1798, returning to India early in 1799, where he died shortly afterwards. According to the Court Books, Mr. Caunter appears to have acted as Superintendent, and Mr. Manington as Magistrate, until the arrival of Sir George Leith, the first Lieutenant-Governor, under the new arrangement in 1800. During Mr. Caunter's superintendship, nothing seems to have happened, and up to the end of the century,—as indeed up to the proclamation of the first Charter of Justice in 1808,—each class received full recognition and protection, according to its own laws and usages—in other instances, the law of nature practically superseding any other.

CHAPTER II.

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1800—1808.

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After the death of Major McDonald, the Government of India changed the form of the local Government, as before alluded to, and Sir George Leith, Bt., arrived here on the 19th April, 1800, as Lieutenant-Governor.

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The following is an extract from his instructions, dated 15th March 1800, under heading

"The Administration of Civil and Criminal Justice."

Sec. 15. The Right Honorable the Governor-General in Council, having reconsidered the circumstances which have hitherto prevented the establishment of regular Courts of Justice at Prince of Wales' Island, entertains no doubt of its being equally the right and the duty of the British Government in India to provide for the administration of Justice to the native inhabitants of that Island.

16. The laws of the different people and tribes of which the inhabitants consist, tempered by such parts of the *British law*, as are of *universal application*, being founded on the principles of *natural justice*, shall constitute the rules of decision in the Courts.

17 You will accordingly proceed to frame Regulations for the administration of Justice to the native inhabitants, founded on the above principles.

18. The regulations should define the constitution and powers of the Courts, the cases in which an appeal is to be allowed to you in the first instance and in the

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last resort to the Governor-General in Council, and they should also specify the fees, which circumstances may admit of your establishing, on the amount of the money, or the value of the property for which suits may be instituted, with a view of defraying the expenses of the Court, including the salary to be allowed to the Judge and Magistrate before whom causes are to be tried in the first instance.

19. As the Code of regulations for the administration of Justice in Bengal may be of material assistance to you, in framing regulations for the administration of Justice at Prince of Wales' Island, a copy of that Code is now sent to you.

20. With regard to Europeans, residing in the island, they should be required to render themselves amenable to the same Courts as the native in civil cases, and also in those criminal cases, in which the party injured can be compensated by damages.

21. You will furnish a draft of the covenants which you would recommend that Europeans should be required to execute, with a view to the application of the above principles.

22. Until the regulations which you are now required to prepare shall have been confirmed by the Governor-General in Council, you are to consider the regulations at present in force, as the rules for your guidance with regard to the administration of Justice.

23. Europeans guilty of murder or other crimes of enormity, should, for the present, be sent under custody to Fort William.*

Sir George Leith was also informed that "Mr. Caunter, the first Assistant," was "to be the first Assistant under his [Sir "George Leith's] Secretary." In a letter dated 10th May, 1800, addressed to the Chief Secretary to the Government of India, Sir George Leith announces his arrival in the Island and his assumption of duties, and in reference to the administration of Justice, he says: "I am now using all my endeavours to forward to His "Lordship in Council, a plan for the administration of Civil and "Criminal Justice," and on the 14th of August, 1800, the Governor-General in Council informed Sir George Leith that Mr. Dickens, an English Barrister, had been appointed Judge and Magistrate of Penang. The reason for this appointment is given in the following extract from a despatch to the Board of Directors, dated 2nd September, 1800.

"Sec. 26. The Governor-General in Council, in his letter of the 1st March last, acquainted your Honorable Court that he had appointed Sir George Leith to be Lieutenant-Governor of Prince of Wales' Island.

27. His Lordship's instructions to Sir George Leith are recorded in our proceedings of the 20th March last.

28. The increasing importance of the Settlement of Prince of Wales' Island, its distance from the seat of the Supreme Authority in India, and the factious and disorderly conduct of some of the European inhabitants of the Island, rendered it indispensably necessary that its local administration should be established in a respectable footing.

29. His Lordship in Council therefore judged it necessary to substitute the special designation of Lieutenant-Governor for that of Superintendent and to annex to the office the extended powers detailed in the above-mentioned instructions.

36. With a view also of providing more effectually for the administration of Justice on the Island, the Governor-General in Council has appointed Mr. Dickens to be Judge and Magistrate of the Island. This gentleman has practised for several years, as a Barrister in the Supreme Court of Judicature at Fort William, with considerable reputation, and he is fully qualified for the discharge of the judicial duties of the Island, which are now become laborious and important.

* *Jour. Ind. Arch.*, March 1851, p. 157.

37. The Governor-General in Council has not yet determined on the allowance to be granted to Mr. Dickens, His Lordship purposes to take a future opportunity of addressing your Honorable Court on this point as well as on the subject of the constitution of the Court of Judicature, which he proposes to establish at Prince of Wales' Island."

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The first and only appeal case by a private individual, before the proclamation of the Charter, and which was apparently allowed under section 18 of the foregoing instructions, is to be met with at this time in the records. The appeal arose out of a land-case wherein one *Salleh* and *Oosman Neena* were plaintiffs and one *Loung Pakier Gandar*, defendant. The case was originally heard before Mr. Caunter on the 2nd September, 18th and 21st October, 1800, judgment being given in favour of the plaintiffs, and confirmed by the Lieutenant-Governor, who "could not help remarking upon the very improper means which appeared to have been used to deter Rajah Palawan from delivering his evidence in Court, and also upon the information which the defendant declared he received, that no European was allowed to give evidence in causes where natives only were concerned, by which means the cause was not only delayed some days, but an attempt made to impress on the minds of the native inhabitants that the same degree of justice would not be administered to them as to every other inhabitant, a doctrine as unfounded as injurious to the British Government." The defendant having obtained leave by petition to the Lieutenant-Governor, on the 10th November, 1800, appealed against the decision to the Governor-General of India in Council. The following note on the case, made nearly three years after, shews the result:

"This Decree confirmed by His Excellency the Governor-General in Council, as notified in Mr. Secretary Philpot's letter to the Lieutenant-Governor, dated the 31st March, 1803.

W. E. PHILLIPS,

Secretary to the Lieut.-Governor."

23rd May, 1803.

Mr. Dickens did not assume duties till some time after his appointment. In April, 1801, Sir George Leith was apprised by a letter from the Secretary to the Government of India of Mr. Dickens' departure, and that he, Mr. Dickens, had been instructed "to continue to act upon the principles of the existing laws and regulations of the Settlement until further orders."

Sir George Leith in May, 1801, complains to the Government of the attitude assumed by the Europeans, and recommends the banishment of one of them from the Island, he adds: "I am compelled to make this reference, and should I be honored with the approbation of His Excellency in Council in this instance, I hope it will put a stop to that litigious and turbulent conduct which has and still continues to influence the actions of many members of this Settlement."

Mr. Dickens arrived on the 7th of August, 1801. He took the bench for the first time on the 27th of that month, up to which period both Mr. Caunter and Mr. Manington, appear to have acted

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as "Magistrate" and "Assistant" respectively.* Not long however, after his arrival, Mr. Dickens found out the anomaly of his position. In a letter dated 1st October, 1801, he addresses the Lieutenant-Governor as follows:

"Since my arrival at this Settlement, I have inspected the public records, and find the laws and regulations for the administration of Justice contained in a letter dated the 1st August, 1794, from the Governor-General in Council, addressed to Mr. Light, the then Superintendent of the Island.....I confess that I cannot readily conceive it to have been the intention of His Excellency the Most Noble the Governor-General in Council, to appoint me Judge and Magistrate of this Settlement, and at the same time to withhold from me judicial and magisterial authority, and I am also fully aware of my inability to render the Government or the public much service, under the existing regulations, which I lament were not made known to me prior to my departure from Calcutta. But I will cheerfully exert myself in performing my share of the public business, so as to lessen the public inconvenience as much as the personal labours of an individual can effect it, and when it is considered that the current business of the Court of Adaulat is managed through the medium of Portuguese, Chinese, Malay and Siamese interpretation, that the proceedings of every case, criminal and civil, are reduced into writing, that there is not a single officer attached to the Court, but the Provost or Gaoler,† that the Judge and Magistrate has neither Register, Clerk nor assistant of any kind, and that the business civil and criminal is considerable, independent of the Police, it will be apparent that little of it can be well performed, that much of it must be delayed, and that until the aforesaid regulations are entirely abolished, justice cannot be effectually administered to the inhabitants of this populous island. To establish a regular Court of Justice for this Settlement, is a work that may easily be effected, and I hope will not any longer be delayed."

Mr. Dickens then complains of the want of authority over British subjects, "having been under the necessity of declining "all interference in complaints against them of either a civil or "criminal nature,.....as the power given to the Lieutenant-Governor [of demanding of British subjects to account with their "creditors, and in certain cases of summoning them, &c., &c.,] "was not such a power as could be delegated to him." He also lays great stress on the inadequacy of the Police, and proceeds to make suggestions as regards these. The only reply Mr. Dickens got to his letter was, that it had been forwarded to India. Mr. Dickens however did not rest satisfied, and in a letter dated 25th October, 1801, he again urged the necessity of laws being immediately enacted, and asked that he "or some other person should "be empowered as ordinary, to take possession of the real and "personal property of persons dying intestate in the Island, or "where they left, executors and those were absent from the "Settlement,.....great frauds being said to prevail, and the "creditors of persons dying intestate, finding it impossible to "obtain payment of their debts, from the assets of the deceased." Correspondence regarding the state of the law continued with

* According to the Court records—*Ecclesiastical Side*—Mr. Manington died in Penang on the 13th June, 1806, and was then "Paymaster of the Hon'ble Co."—Mr. George Caunter died in April, 1812, and up to 1811, the Court papers mention him as "Police Magistrate."

† This official was also "Sheriff, Gaoler, Coroner, Constable, Bailiff, and Officer of Police," and in addition to the foregoing [with the exception of the Gaolership in 1807, when one William Russell was appointed in that capacity], the records from 1805 to the proclamation of the Charter also shew him as "Clerk of the Crown for the trial of all persons committed for capital offences" [Clerk of the Crown ?] and lastly as *Acting Register*.

indomitable energy on the part of Mr. Dickens, until the departure of Sir George Leith for India on leave of absence on the 2nd December, 1802. Prior to the departure of the Lieutenant-Governor however, in a letter dated 20th November, 1802, Mr. Dickens requested him "to represent to the Governor-General in Council, the many inconveniences sustained by the inhabitants of Prince of Wales' Island from the want of all civil laws, and especially from the want of laws regulating the descent and alienation of land, and directing the administration and distribution of the effects of persons dying intestate in the Island, and leaving property there situate....." As above stated, Sir George Leith left for India on the 2nd of December, 1802, being replaced during his absence by Mr. W. E. Phillips, the Secretary to the Government. After Sir George Leith's departure, Mr. Dickens seems to have administered justice as he had found himself compelled to do heretofore, that is to say "according to his instructions" and on the principles of English law, where he considered them universal and applicable.

During Mr. Phillips' short administration, the records disclose altercations between him and Mr. Dickens on the subject of the dismissal of a case [*The Government v. Carni*, 5th April, 1803] brought before him on a certain Regulation, dated 18th December, 1802,* passed by Mr. Phillips, and which Mr. Dickens had previously refused to adopt, considering the measure "unjust, unreasonable and repugnant to the laws of the realm of England," apart from considering also that the Acting Lieutenant-Governor had no authority to pass such a Regulation,† but which case however, Mr. Dickens only dismissed on the sole ground that the evidence did not support the charge, without going into the subject of the Regulation at all. On the case being sent to the Acting Lieutenant-Governor, the latter sent for Mr. Manington his "second-assistant," who had already been examined by Mr. Dickens as a witness in the case, and after further examining him, reversed the Judge's decision, and sentenced the prisoner to four months' hard labour. This matter will be found referred to further on, by Mr. Dickens, in a letter addressed by him to the Government of India, on the 21st June, 1803.‡

* "Regulation for the registering of spice-plants, for the better security of the planters, and in order to aid in the detection of such ill-minded persons as may steal clove or nutmeg plants and transplant them in their own ground."

† On this point see further, time of *Sir Benjamin Malkin*, B., 1833-35, *infra*, Chap. 5.

‡ The following are extracts from the correspondence that arose on this subject:

SERVICE.

To

W. E. PHILLIPS, Esq.,

Acting Lieutenant-Governor of Prince of Wales's Island and

its Dependencies.

SIR,

1. I have received the proceedings in the case of the Government *versus* Carni, [which I yesterday transmitted to you] and which have been now returned to me, with an annexed sheet, containing an examination of Philip Manington, Esq., taken upon oath by you, as Acting Lieutenant-Governor, at the Government-House,

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PHILLIPS,
AG. LIEUT.-
GOVERNOR,
DEC. 1802—
MAY, 1803.

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On the 12th of May, 1803, Sir George Leith returned to Penang. From this moment a regular *guerre de plume* broke out between the Judge and Magistrate, and the Lieutenant-Governor. Angry correspondence passed between them, Mr. Dickens complaining of the interference of the Lieutenant-Governor with the independent discharge of his duties,—the Lieutenant-Governor only assenting to such decisions as met with his own views and reversing all those with which he disagreed, and substituting his own. The following will illustrate one of those cases, tried on the 21st May, 1803 :

John Brown, Provost, “on behalf of the Government,” charged

and dated the 7th of April, 1803, that is to say, to-morrow, to questions there put to him by you.

2. That is, in fact, a secret and private examination of one of the persons, who was yesterday sworn in open Court, at the trial of the said Carni, to give evidence of all he knew respecting the subject matter, then before the Court.....

3. The aforesaid annexed sheet containing also a judgment given by you in this case, I feel it my duty, therefore, to declare, that I am of opinion you do not possess in your character of Acting Lieutenant-Governor of this Island, under the Regulation of the 31st August, 1794, or under any commission or authority which I am cognizant has been to you given, by the Governor-General in Council, any legal power of examining at the Government House, any witnesses in any cause who had been previously examined by me in the same cause, as judge sitting in the Court of Adaulet, in the presence of the accused. I am of opinion that you could not *legally*, thus prop up the testimony given by any witnesses in open Court, that you could not *legally*, thus deprive the accused, of his benefit of cross-examining any such witnesses.

4. The Regulation of the 31st August, 1794, after defining the powers of the Judge thus qualify those powers: “No sentence to be carried into execution without the approbation of the Superintendent for the time being.” These words give you no power as Acting Lieutenant-Governor, as I conceive, of altering the sentence of the Judge, much less of a criminal offence, a man who had been tried and acquitted by him, as Judge in a regular legal course of proceeding.

5. It appears to me, that you have united in your own person, *legislative* powers, by enacting of your sole authority, as a law, binding [if it could bind] me as Judge, the regulation passed by you of the 18th December, 1802, *judicial powers* by the secret examination taken, and positive judgment given, in a cause wherein, the Government, that is, yourself, representing the Government, is a party, and *executive powers* by carrying that judgment into execution, yourself. You have in a manner said—So I order, my will shall be the Law. It is not for me to say, what are the limits of your powers as Acting Lieutenant-Governor of Prince of Wales’ Island, but permit me respectfully to decline, taking any part in carrying your judgment against Carni into execution. I still think that he was innocent, of the crime, of which he was accused,* and that a man should not be convicted, until his guilt is proved. The escape of a delinquent of that or any other description can never do so much harm, as must arise, from the infraction of a rule, upon which the purity of public justice depends.....

I have the honor with all due consideration to be,

Sir,

Your humble servant,

JOHN DICKENS,

Judge and Magistrate, &c.

COURT OF ADAULET,

George Town,

The 6th of April, 1803.

Mr. Phillips replied

* “Carni, a gardener in the service of Philip Manington, Esq., for stealing, &c., 247 nutmeg plants, the property of the Hon’ble the United Company, &c.”

one *Hough*, a Chinaman, with stealing certain carpenter's tools, "the personal goods and property of whom, the said John Brown has been informed, were late the personal goods and property of "one *Loung Hang*, deceased, and which said goods were fraudulently taken and carried away from the late dwelling-house of "the said *Loung Hang*, deceased, on the 19th instant, against the "peace, &c." To the charge, the prisoner pleaded not guilty, and in his defence, denied he had stolen the tools and asserted that the deceased was his relative. Mr. Dickens delivered the following judgment:

"Under the circumstances in which this Island is placed of not having any laws transmitting the property of a person dying here [leaving property] to any certain description of persons, either kindred by consanguinity, affinity or otherwise, it is impossible for the Judge to say who is the owner of the carpenter's tools, the subject of the present prosecution. And it is an axiom of general law in the civilized parts of the world, that no theft can be committed unless there be some property in the thing taken and owner thereof. These carpenters' tools may indeed be called the property of a person unknown, and a prosecution may be carried on for taking them, without the intervention of the owner, as in the case of wreck, warf or stray, being taken away by others, before they have been seized by those who have a right thereto. But by the laws of England such taking would not be felony, and would only be punished by fine. It is difficult in this case to determine in whose custody these carpenters' tools were after *Loung Hang*'s death, so as to create a special property therein, and a dead man can have no property, and there is no law of succession continuing the property in chattels after *Loung Hang*'s dereliction of them by his death, to convict the prisoner of the charge of stealing these tools.

It appears to the Judge, property therein must be proved in somebody, but no evidence being given to this effect, the Judge must, if English law furnishes the rule, presume it in the prisoner from the plea of not guilty, and he is accordingly acquitted of this charge.

JOHN DICKENS,

Judge and Magistrate."

This decision was, as usual, forwarded by the Judge and Magistrate to the Lieutenant-Governor who, disagreeing with it, substituted the following:

"It appears to me, that the prisoner, having first denied any knowledge of the
as follows:

To

JOHN DICKENS, Esq.,

Judge and Magistrate, &c., &c.

SIR,

I have the honor to acknowledge the receipt of your letter to me of yesterday evening, but with due respect to your judgment, must decline entering into any discussion on the duties of the station I have at present the honor to hold, or upon the mode I may think proper to adopt in carrying them into execution.

I have therefore only to observe, that as the Supreme Government directed you to "act under the existing Laws and Regulations of the Island, until further orders," and as you declined to enforce a regulation which I deemed myself authorized to frame, and expedient to promulgate for the welfare of this Settlement, I was under the necessity of using the authority vested in me, and of enforcing the Regulation; for which I am answerable to the Governor-General in Council alone.

I have, &c.,

W. E. PHILLIPS,

Acting Lieutenant-Governor.

FORT CORNWALLIS,
Prince of Wales' Island,
The 7th April, 1808.

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carpenters' tools, and then bringing three saws and delivering them to the prosecutor, is a clear proof that he did know where the tools had been deposited, and that he was conscious in his own mind he had not any right to them, otherwise it is not likely that he would have delivered them without asserting his claim to them at that time or at all events when first upon his defence. I do therefore think he is guilty of stealing the said carpenters' tools, and do accordingly adjudge him to be imprisoned two months in gaol, and put upon the works for that period.

The tools to be delivered to the prosecutor.

GEO. LEITH,
Lieutenant-Governor."

Greatly irritated at this decision of the Lieutenant-Governor, Mr. Dickens, on the receipt of the papers, immediately wrote him the following letter :

COURT OF ADAULET,
George Town,
May the 22nd, 1803.

"To

SIR GEORGE LEITH, BART.

Lieutenant-Governor of Prince of Wales' Island.

SIR,

I have received the proceedings in the case of the *Government v. Hough*, which I yesterday transmitted to you, and on perusing the same, I find that you have convicted the said Hough of larceny, who had been by me acquitted in a regular course of trial of that offence.

By the regulation of the 31st of August, 1794, the Superintendent for the time being can arrest the execution of the sentence of the Magistrate, and can order a new trial, but no judicial power is given to the Superintendent, to convict a person acquitted by the Magistrate by virtue of the said regulation, and I know not of any greater.

The sentence you have given, appears to me unwarranted by any power to you given, with which I am acquainted, and totally inconsistent with any principle of civil and criminal justice : I therefore hold it my sacred duty to represent to you, in the strictest manner, the sense I entertain of this act, leaving you to order the execution of your own sentence, in any manner you are pleased to direct, for I cannot in any manner be instrumental to the punishment of a man whom I have found innocent.

After your perusal of this letter, in the event of your being pleased to order the execution of your own sentence, I have enclosed an attested copy of the proceedings in this case, which I request you will transmit with due vigilance, with a copy of this letter, to be laid before his Excellency, the Most Noble the Governor-General in Council, *by the Vigilant now under despatch* ; since in my opinion justice will be deeply wounded by your act. But let me again further beg leave to state, that the owner of the goods apparently dying without a Will, and without any heir or representative, and there being no Ordinary on this Island, to whom the goods could be said *pro tempore*, to belong, and the goods not being found in the possession of any one,—the prisoner was tried for stealing the goods of a person unknown, and guiding myself by those general principles, of the criminal law of England, which are not local but universal, and founded on reasons everywhere applicable, I have decided this case according to what Lord Chief Baron Gilbert did in a case before him. He said : "An indictment might be good for stealing the goods of a person unknown, *but a property must be proved in somebody at the trial*, otherwise it shall be presumed that the property was in the prisoner by his pleading not guilty to the indictment, for a man shall not be found guilty of felony, and hanged upon presumption."

My situation as Judge and Magistrate of this Settlement, having given me frequent opportunities to observe the manifold inconveniences arising from the want of an Ordinary at this place, on the 20th November, 1802, understanding you were going to Fort William, I addressed you on the service, and requested you would represent these inconveniences to His Excellency, amongst others which I then pointed out.

As since your return, you have not done me the honor of making any communication on this or any other of the many subjects respecting the administration of Justice which in my opinion greatly call for regulation, I am under a necessity of acquainting you, for the information of His Excellency the Most Noble the Governor-General in Council, that as I have done, so I shall continue to decide in criminal cases, upon the general principles of English Criminal Law, and the law of evidence received in English Courts of Law, and if it is intended that I should decide by any other law, or if it is His Excellency's pleasure that your decisions should be according to *Martial Law* or *Secundum Arbitr*, and severally those given by me, according to the general principles of

the law of England, I hope to be honored with His Excellency's directions therein, that I may not hereafter decide any case contrary to your judgment or without being previously instructed therein.

I have, &c., &c.,

JOHN DICKENS,

Judge and Magistrate.

LETTER,
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DICKENS,
J. & M.

In answer to the above, Mr. Dickens got the following curt reply :

PORT CORNWALLIS,
The 22nd May, 1803.

To

JOHN DICKENS, Esq.,

Judge and Magistrate,

&c., &c.

SIR,

I am directed by the Lieutenant-Governor to acknowledge his receipt of your letter to him of this date.

I am, Sir,

Your obedient servant,

W. E. PHILLIPS,

Secretary to the Lieutenant-Governor.

The following is also another illustration of the cases on record, where Mr. Dickens complained of interference by the Lieutenant-Governor with the discharge of his duties. The case, apart from this circumstance, and its interesting nature, is also inserted as illustrative of some of the early decisions given in the Colony.

Court of Adaulat.

2nd June, 1803.

Palangee v. Tye Ang
and

In the goods of Ethergee, deceased.

Palangee, by his bill of complaint, claimed the sum of 605 Spanish dollars from the defendant in virtue of a nuncupative Will of the deceased, and alleged he was the cousin of the said Ethergee, and had been specially requested by the testator to receive the aforesaid sum from the defendant Tye Ang, and appropriate the same to his [Palangee's] use. The defendant admitted his indebtedness to the deceased, but denied all knowledge of the plaintiff, and expressed his willingness to pay the money to the Lieutenant-Governor, on his getting a receipt therefor, and on his being indemnified against any future claims.

Mr. Dickens delivered the following judgment :

The complainant Palangee by his bill of complaint, alledging himself to be the representative of one Ethergee [who died on this island] claims and sets up a right to demand and receive from the defendant Tye Ang, the sum of six hundred and five dollars as due to the estate of Ethergee.

The defendant admits that he is indebted to the amount stated, to the estate of Ethergee, but denies that the complainant is the legal representative of Ethergee, and avers that the said complainant is not by any law in force at Prince of Wales' Island, authorized to receive the assets of Ethergee, and that the said complainant cannot by his receipt discharge the defendant from the said debt, if claimed hereafter by a legal representative of Ethergee.

The facts proved in the cause, are the death of Ethergee at Prince of Wales' Island, and that he made a nuncupative Will an hour before his death, which happened about a month and fifteen days ago, and in his own house in the house of One witness named

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Coorjee, and of the complainant, by which Will he gave his property to his brother at Bombay,—and that the deceased left a daughter at Surat is stated in the complainant's bill of complaint. The allegation in the Bill, that the complainant is the cousin of Ethergee is not substantiated by any evidence, but Coorjee deposes that the deceased desired the complainant to collect his debts and effects. Upon these facts, the Judge and Magistrate is called upon to give a judicial opinion [under the Regulation of the 1st August, 1794, by which the Judge and Magistrate is directed to hear and try actions of debt, and all suits of a civil nature—and also under the instructions given to the Judge and Magistrate to act upon the principles of the existing laws and regulations of this island]—Whether the complainant can compel the defendant to pay the debt owing by him, to the deceased's legal representatives, to the complainant in this cause: The Judge and Magistrate thus situated, finds it necessary, to premise some material observations, before he delivers his judicial opinion in this cause, that the reason of that judicial opinion may not be misunderstood.

1st. After the strictest enquiry for the existing laws and regulations of this island upon the principles of which the Judge and Magistrate has been as aforesaid, directed to frame his judgment, the Judge and Magistrate has ascertained, that Prince of Wales' Island prior to its cession to the British Government was under the dominion of a Chief who governed it in an arbitrary manner, and not by any fixed laws, and it does not appear to the Judge and Magistrate that since the said cession, any code of civil municipal law has been enacted by due and competent authority as the law of this island for the government of the Judge and Magistrate in pronouncing a judicial opinion in this cause. And it is certain that the Judge cannot find one single civil or municipal law so enacted, and the municipal laws of any other country, merely as such, cannot have any legal force at Prince of Wales' Island.

2nd. The only law then that appears to be in force at Prince of Wales' Island, is "The Law of Nature"—for Municipal law, or Civil law, by which the society at Prince of Wales' Island may be governed, however much wanted, has hitherto escaped the research, and has not been produced by the industry which the Judge and Magistrate has been enabled to apply for its attainment. And the Judge and Magistrate trusts that that industry, however unsuccessful, has not been unobserved by the Supreme power which rules this island.

3rd. But the law of nature is silent, and gives no precepts respecting Wills, and testaments, or rights of succession, or of inheritance. It affords no light upon these subjects, or respecting the forms and precautions necessary to be observed in granting probates of Wills and Letters of Administration to intestates effects. These things are mere creatures of civil or municipal law—when any of these things therefore, become the subject of judicial controversy before the Court of Adaulet for this island, where is the Judge and Magistrate to look for information? He has no resource, but in his own unassisted reason—*Sed melius est judicare secundum leges et literas quam ex propria sententiâ et sententiâ.*

4th. It is true that Wills and testaments, rights of succession and inheritance in most of the civilized countries of the world are regulated by the Civil and Municipal law of each country—but then nothing varies more than the rights of inheritance or succession, and the forms and precautions observed in granting probates of Wills and letters of administration to intestates' effects under different national, and even under different provincial establishments. It is hence apparent also that it is the power of the Civil, Municipal law, and that alone, which regulates the succession to property; and the different ceremonies requisite to make a testament valid, and for granting probate thereof, as well as for granting letters of administration to the effects of persons dying intestate, depend in civilized countries upon the Civil, Municipal, law alone, and not upon the unassisted reason of the Judge.

5th. As all claim to the property of a deceased person therefore, must be futile, if it is not founded on the positive Municipal or Civil law of the place, where the property is placed, the "*lex rei sitæ*," for the law of nature is silent thereon, and as Prince of Wales' Island is absolutely without any positive Municipal or Civil law, and as the positive Municipal or Civil law of any other country cannot as such have the force of law at Prince of Wales' Island, and if it could, as the positive Municipal or Civil laws of different countries greatly vary—What in this case is the duty of the Judge and Magistrate—Where is he to find a Rule of decision? Where a principle of selection?

6th. It appears to the Judge and Magistrate, that thus situated, it is his primary duty to prevent injustice, cautiously to administer the sacred office committed to his charge, and to seek in the absence of positive Municipal Law, and precise instruction, some fair principle, wherever he may find it, which may serve the justice of the case, and if the Judge and Magistrate errs, it will be remembered

"*Humanum est errare*," the duties he has to perform are likely to embarrass a much wiser person than he can pretend to be, and he has the consolation, that his errors are not without remedy, they can be rectified by the best informed and the highest authority in India.

7th. To prevent tumults, and the good order of this island, from being disturbed, which must happen if cases of this nature were not decided by judicial authority, since a variety of persons would contend about the possession of property left derelict by the death of its owner, the Judge and Magistrate [without the assistance of any Civil or Municipal law] has thought himself called upon to give a judicial opinion in this case, although perhaps, it may, by higher authority, be thought a case not within the Judge and Magistrate's jurisdiction.

8th. The Judge and Magistrate, who was taken from the English bar, where he had the honor of being, by His Excellency the Most Noble the Governor-General, placed in this office, very naturally looks to the general principles of the law of England, and whenever [by fair analogy, and considering the difference of circumstances of men and things at Prince of Wales' Island, compared to those in England] the principles of either the Common or Statute Law of England can be made subservient to the decision of cases brought before him, the Judge and Magistrate in the absence of positive Municipal, or Civil law means to avail himself of that help which his knowledge of the laws of England may furnish in deciding such cases.

9th. The Statute of Frauds and perjuries, that is to say, the 20th Charles 2, Chapter 3, sections 19 and 20, furnishes a rule, of which the principle seems applicable to the decision of this case. That Statute enacts: "That no nuncupative Will shall be good, where the estate bequeathed exceeds the value of £ sterling 30, "if it is not proved by the oaths of three witnesses at the least—that were present "at the making thereof—nor unless it be proved that the Testator at the time of "pronouncing the same did bid the persons present, or some of them,—bear witness, "that such was his Will, or to that effect—nor shall it be proved till process hath "first issued to call in the widow or next-of-kin to contest it if they think proper."

It is the opinion therefore of the Judge and Magistrate, [as the complainant has not proved himself akin to Ethergee, who has left a daughter at Surat, and a brother at Bombay, nor offered any reasons why he should be entrusted with the administration of the estate, even if he had proved himself akin to the deceased, without giving good security that he will not embezzle the effects, as is practised in the Courts where testamentary causes are decided in the other parts of the British Dominions, and as he has not in his bill offered to give that security, and as the Nuncupative Will is not proved by the oaths of three witnesses who were present at the making thereof] that the complainant's bill of complaint should be dismissed, and the defendant released from further attendance on this Court.

JOHN DICKENS,

Judge and Magistrate.

This decision was reversed by the Lieutenant-Governor, who remarked as follows:

BY THE LIEUTENANT-GOVERNOR.

June 3rd, 1803.

The defendant Tye Ang having admitted that he is truly indebted to the estate of the deceased Ethergee, in the sum of Spanish Dollars six hundred and five [605], and further that he is willing to pay the above-mentioned sum into the hands of the Lieutenant-Governor of this island, on his having a receipt granted for the same; and on his being indemnified by the said Lieutenant-Governor against any claim that may hereafter be made on the part and behalf of any of the heirs or representatives of the said Ethergee, or of any other person or persons who may be legally entitled to demand the same in a due course of Law: Therefore in order to prevent any loss or detriment to the kin or heirs or representatives of the aforesaid Ethergee, deceased, the Lieutenant-Governor is willing, in the meanwhile, and until some person lawfully authorized shall appear hereupon to receive from the defendant Tye Ang on the part and behalf of the said kin or heirs or representatives, the said sum of Spanish Dollars six hundred and five [605] into the Hon'ble Company's Treasury at this Island, and to grant the defendant a receipt as required for the same; and the defendant is therefore ordered and directed to pay the above-mentioned sum into the Hon'ble Company's Treasury on or before the 15th day of this present June 1803, when copy of this decree, signed by the Lieutenant-Governor, shall be delivered to the defendant Tye Ang as a certificate thereof, to serve as a receipt for the same, and an indemnity

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against all claims thereafter to be made upon or against the said Tye Ang. or his heirs or representatives for paying the said sum of six hundred and five Spanish Dollars as hereby required.

GEORGE LEITH,

Lieutenant-Governor.

This decree of the Lieutenant-Governor, was carried out in opposition to the decision of Mr. Dickens, and the estate administered by him. It may not be considered tedious to cite one further case as illustrative of the nature of sentences passed at this period for criminal offences; the more so, as jurisdiction in cases of perjury, seems to have been exercised very summarily,—the prisoner being brought up immediately on the conclusion of the case wherein perjury was said to have been committed, and sentenced :

4th June, 1803.

The prisoner [*Hoong Pah*] was charged with having falsely sworn on the above day, in a case wherein one *Mababa* was the plaintiff, and one *Ches Choo*, the defendant, that he had seen the plaintiff "put her mark to a certain paper-writing," in "the presence of" *Tiquo*, Captain of the Chinese, whereas in truth and in fact, "*Tiquo*, the Captain of the Chinese, was not present, &c., &c."

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SENTENCE :

Hoong Pah is convicted of the offence of wilful and corrupt perjury, and is sentenced to be set in the Pillory opposite to the Captain China's house in George Town, on Monday next, at 5 o'clock p. m., and to remain in the said Pillory for one hour, and to have a paper put upon his head, written in the Chinese language and character, 'for swearing falsely before the Judge,' and after he is taken from the Pillory, the said Hoong Pah is to be publicly whipped, and to receive fifty lashes in the usual manner, and on the 7th day of September next, the said Hoong Pah is to receive another fifty lashes in the usual manner, and on the 8th day of December next, the said Hoong Pah is to receive another fifty lashes in the usual manner, till which last-mentioned day, the said Hoong Pah is to be imprisoned and put to labour on the public works, and after that day he is to be discharged, and the said Hoong Pah is hereby for ever rendered incapable of being admitted as a witness, in any case before the said Judge and Magistrate.

JOHN DICKENS,

Judge and Magistrate.

Unlike other decisions and sentences, no annotation of the Lieutenant-Governor appears in this case, beyond the following note by the Provost :

"On account of the bad state of health of the prisoner, the Lieut-Governor has been pleased to respite the execution of the sentence till further orders.

J. BROWN,

Provost.

June, the 6th, 1803.

At this period, a serious discussion took place between the Judge and the Lieutenant-Governor. The case wherein this arose, was that of one *Cauder v. Ibrahim*, and wherein, a native Captain had exceeded his jurisdiction, according to the Lieutenant-Governor's "Instructions," dated 1st May, 1800, by dealing with a demand exceeding \$10, which case came judicially before Mr. Dickens, who animadverted strongly upon it, as well as on the

powers granted to native Captains in such cases [a.] Angry correspondence again ensued, the Lieutenant-Governor informing Mr.

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[a.] As these "Native Captains" administered justice for such a number of years after the foundation of the Colony, and as a matter of fact, formed part of an institution recognised and controlled by the then Government, it will not be thought out of place to give here a copy of the more recent Rules [redrafted on those of 1794] under which they were guided, the more so, as the question of investing Native Chiefs and Village head-men, with certain powers over their own sect, was but recently under the consideration of the Government. The following therefore cannot but prove interesting, and is taken from the Court Records:—

*Instructions for Native Captains.**

- Art. 1st. You are hereby appointed Captain of all People under the denomination of in Pulo Pinang.
- 2nd. You are to keep good order among your People, to see that they behave quietly and peaceably in their Habitations, as you will be answerable for the same, and you will be protected and supported by Government in the duty of your office.
- 3rd. You are to hold a Court at your own house twice a week on the days preceeding the Cutcherry days.
- 4th. You are to try all petty causes, between people of your own tribe, such as people quarrelling, fighting, or abusing each other, and all religious or family disputes, you are to determine agreeably to the Laws of your own Religion.
- 5th. In all cases of debt under ten Dollars, your decision shall be final.
- 6th. In all cases of debt, if the demand is for more than ten Dollars, and either of the parties not satisfied with your decision, they may appeal to the magistrate, after acquainting you with their intention so to do, and you are to inform the Magistrate thereof, who will give them a hearing the second Court day following.
- 7th. In all causes of appeal, the complainant is to deposit in the Magistrate's Court, [or give security] one Court day previous to that on which the cause is to be tried, five per cent. on the demand, if under five hundred dollars, if above five hundred dollars as far as one thousand dollars, four per cent., and all above one thousand dollars, three per cent.
- 8th. The money so collected to be kept in the Magistrate's office towards defraying the expenses of paying the officers belonging to the same.
- 9th. On a cause being decided, the person who is cast is to pay the amount of the deposit.
- 10th. You are to have two men to sit with you in your Court, and all disputes are to be decided by the majority of voices.
- 11th. In order to prevent all causes of jealousy or discontent among your People, the men for this office, are to be chosen as directed in the following articles.
- 12th. On the first day of every month, you are to give in the names of twelve creditable House-keepers to the Magistrate, and they are to be summoned; their names to be written on twelve pieces of paper and put in a box, and the names of the first eight that are drawn out, those men are to sit with you in your Court. One month, two of them sitting every week, and in case any one is sick and cannot attend, one of the four whose names were not drawn, is to attend in his place.
- 13th. The names of the eight men so chosen, to be published by beat of Gong, and none of them to be exchanged but by consent of the Magistrate, who, in case of emergency, will appoint one of the four whose names were not drawn to act.
- 14th. In case of any person appointed as above directed, refusing to attend

* "Chooliah and Malay." The "Instructions for the Elders of Chinese inhabitants of Prince of Wales Island," also, on record, differ but slightly. It would appear that these instructions were originally written in the different native languages and that the Court copies of the "Instructions" were but mere translations, judging from the following "..... On the 7th August 1801, Mr. Swain was "so obliging as to translate for my private use, the instructions given by you to the "Captain Malay, and I beg leave to add, that there was no English copy of your instructions to the Native Captains, anywhere to be found....." Mr. Dickens to Sir George Leith, 13th June, 1803.

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Dickens that his remarks were improper and unbecoming, that he was prepared to take upon himself the administration of Justice, and of his intention to submit the papers in the matter to the

without shewing sufficient reason, he will be fined, the first time five dollars, the second time ten dollars and forfeit the protection of the Court for six months, the third time he will be confined in the common Jail for one month.

15th. If the parties in dispute are of two different tribes, you are to appoint two men of each tribe in dispute, and they may choose another person for an Umpire, a majority of these five to determine, in all disputes under ten dollars. If above ten dollars and the parties are not satisfied with the decision, they may appeal to the Magistrate, as directed in the seventh Article.

16th. In case one of the parties complains to his Captain, that he thinks himself injured by the decision of the five People as above directed; the Captains of the two parties are to make the same known to the Magistrate, who will order two men out of the eight of each caste that are in dispute to sit with the Captain of the third caste, and the decision of the majority of these five to be final.

17th. You are to keep Register of all Marriages, Births, and Deaths among the people of your tribe,—for which purpose you are allowed a writer, and you are to bring such Registers, and shew them to the Lieutenant-Governor every three months, on the first day of the month.

18th. Upon the arrival of any people of your tribe in the island, you are to make the necessary enquiries about them and inform the Governor thereof, and if any stranger comes to lodge in any man's house, if it be only for a night, the landlord of the house is to give in to his Captain or those acting under him, in writing the name and occupation of such person, as he [the landlord] must be made answerable for the behaviour of such person.

19th. You are to attend the Magistrate's Court on Court days, and to bring with you a Lebbie* who is qualified to administer oaths to such people as may have occasion to swear in Court, and in case of any disturbances, discontents or combinations among your people, you are to make the same known to the Governor, and you are to see the prices of Rice, Paddy, &c., settled, and to examine the weights and measures among the people of your tribe.†

[Signed] GEO. LEITH,
Lieutenant-Governor.

Written by Order of the Lieutenant-Governor, Thursday, 1st May, 1860.

[Signed] W. E. PHILLIPS,
Secy. to the Lieut.-Governor.

* An order of Priesthood.

† This last Article was amended by the Lieutenant-Governor on the 3rd June, 1863, as follows:—

"In consequence of the increase of business at the Cutcheries of the Native Captains, the Lieutenant-Governor is pleased to cancel that part of the 19th Article of the Regulations for their guidance; which orders them personally to attend the Magistrate's Court, and to direct, that in future their Deputies only, with a person qualified to administer oaths, attend the Judge and Magistrate on Court days.

By Order of the Lieutenant-Governor,

W. E. PHILLIPS,
Secretary.

FORT CORNWALLIS,
3rd June, 1863.

On the receipt of this "amended article," Mr. Dickens wrote the following:
GEORGE TOWN, the 4th June, 1863.

To

SIR GEORGE LEITH, BARONET,
Lieut.-Governor of Prince of Wales' Island.

SIR,

1. Upon my return from Court, I received a letter signed W. E. Phillips, Secretary to the Lieutenant-Governor, stating the directions of the Lieutenant-

Governor-General in Council [a.] Mr. Dickens thereupon, obtained permission from the Lieutenant-Governor, and addressed the Government of India. No apology is here offered for inserting Mr. Dickens' letter in full, as it sets out entirely the state of the law, and the condition of the Settlement of Penang, from its earliest days. Some of the cases that had formed the subject of controversy between Mr. Dickens and the local Government, and which have been hereinbefore noticed, as well as the case that gave rise to the letter, [*Cauder v. Ibrahim*] will be found set out in the following :

SERVICE.

PRINCE OF WALES' ISLAND,
COURT OF ADALLET,
GEORGE TOWN, 21st June, 1803.

To

JOHN LUMSDEN, Esq.,
Chief Secretary to Government,
Fort William.

SIR,

1. It is with the express permission of the Lieutenant-Governor of this Island, that I now have the honor of addressing this letter to you, and for the purpose of its contents being submitted to the consideration of his Excellency the Most Noble the Governor-General in Council.

2. The Lieutenant-Governor who has assured me that he will transmit this my representation will probably remark thereon, but if the Lieutenant-Governor should deny the facts as stated by me, I must beg of you to lay before his Excellency in Council my request that I may be allowed to substantiate by evidence any facts stated by me in this letter which may be contested by the Lieutenant-Governor.

3. I find it necessary to premise that his Excellency in Council, on the 23rd June, 1800, appointed me Judge and Magistrate of this island, honouring me at the same time by recording that I had practised with considerable reputation at the bar, and that I was

Governor, that he had thought proper to alter the regulations existing when I arrived at this place respecting the attendance of the native Captains at the Magistrate's Court, and that for reasons assigned in a paper enclosed, viz., in consequence of increase of business at the Cutcherries.

2. I request that you will be pleased to signify this alteration in the existing Regulations to His Excellency the Most Noble the Governor-General in Council, as I was directed to act upon the principle of the existing regulations, and of course to act with the assistance of the native Captains of which I am now about to be deprived.

I have the honor, &c.,

JOHN DICKENS,
Judge and Magistrate.

[Mr. Phillips, on the 6th June, by direction of the Lieutenant-Governor, merely acknowledged receipt of this letter.]

[a] ".....I beg leave to say, that my letter to you.....was not written with any design whatever to convey disrespect to you, on the contrary, it was written with an intention of observing all the respect due to the high station you fill, but at the same time to uphold the respect due to the high station with which I also have been honored. And with the utmost sincerity do I return you my thanks for the communication there made of your intention of laying that letter before His Excellency the Most Noble the Governor-General in Council.....I am pleased to find that as "Assistant to the Lieutenant-Governor" [Mr. Dickens' predecessor,] that gentleman executed the duties of that office in obeying the Lieutenant-Governor's orders, but I cannot admit that it is the duty of the Judge and Magistrate implicitly to obey the orders of the Lieutenant-Governor where they appear to him to contravene the existing laws and regulations of this Island....." [Extract from Mr. Dickens' letter of 17th June, 1803, to Sir Geo. Leith, Bt., in reference to above.]

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fully qualified for the discharge of the judicial duties of this island now become laborious and important—that at his Excellency's desire, personally communicated to me, I prepared some observations which, on the 1st October 1800, I humbly submitted for the consideration of his Excellency in Council with a view to the enacting of certain regulations for the administration of Civil and Criminal Jurisprudence, and for the establishment of Courts of Civil and Criminal jurisdiction and of an efficient Police at Prince of Wales' Island—that on the 22nd January 1801, I humbly submitted for the consideration of his Excellency in Council some additional observations on the same subject*—that on the 30th April 1801, I was directed to proceed to this Settlement by the first favourable opportunity, and on my arrival here, to enter upon the discharge of the duties of the office to which I had been appointed, and to continue to act upon the principles of the existing laws and regulations of this island until further orders—that on the 27th† August 1801, I arrived at this Settlement—that neither upon my first arrival, or at any time since, did the Lieutenant-Governor by word of mouth or in writing, communicate to me or converse with me about the duties of the office of Judge and Magistrate, except that I was soon after my arrival, told by the Lieutenant-Governor's Secretary, that the whole of the Police establishment was under the immediate orders of the Lieutenant-Governor himself, and that neither that establishment, nor the native Captains were under the orders of the Magistrate.

4. The Gentleman who officiated as Magistrate at the time of my arrival, was the first Assistant of the Lieutenant-Governor, and it was his duty as an assistant to the Lieutenant-Governor to carry the Lieutenant-Governor's orders into effect, but I was not appointed an assistant to the Lieutenant-Governor, and no doubt because the wisdom of His Excellency in Council foresaw that the best security for the impartial administration of justice in an island where the government is often virtually interested in the decisions of the Judge, was the independency of the Judge. In my letter therefore to the Lieutenant-Governor hereinafter mentioned, I expressed my surprise that magisterial authority was withheld from the Magistrate, but as regulations for the island were daily expected from his Excellency in Council, at that time I acquiesced without representing the circumstance of the Police establishment [from the time of my arrival] being separated from the authority of the Magistrate, and of the native Captains being then made independent of the Magistrate. It is now however my duty to state expressly for the information of his Excellency in Council that from the time of my arrival here in August 1801 to this date,—although I was appointed Magistrate of the island by the authority of his Excellency in Council, I have not been allowed to perform the functions of a Magistrate by the immediate interference of the Lieutenant-Governor and his Secretary, and that the name of Magistrate has alone appertained to me.

5. The Lieutenant-Governor did not furnish me with any copies of any existing laws or regulations. The Gentleman who acted as Magistrate, on my arrival, gave me no material information of any kind relating to the duties of my office, and the only papers which can in any respect be supposed to be the existing laws and regulations of the island are the following documents—"A letter of the Governor-General in Council, dated 1st August 1794, addressed to Mr. Light, some proclamations, advertisements, and regulations respecting the Police, the convicts, the bazaar, the management of cattle, the articles under which the revenue is formed, and the registering of mortgages with perhaps some less important articles that "I do not now recollect." These are written in a book which was delivered to me by the former Magistrate at the time of my arrival, and these are the papers which can be supposed the existing laws and regulations of the island, which, from the time of my arrival until this day [except the Lieutenant-Governor's instructions to the native Captains] have been by any one communicated to me either directly or indirectly, and I have not been able upon my own researches to discover any other existing laws or regulations of this island.

6. His Excellency in Council has been heretofore informed, that Prince of Wales' Island prior to its cession in 1795 was under the dominion of a chief who governed arbitrarily and not by fixed laws. It is now my painful duty to state that it has so continued to be governed without fixed laws, for upon the hour of my arrival on this island, there were not any civil or criminal laws then in existence, and there are not now any municipal, civil or criminal laws in force on this island.

* These most interesting documents, will be found published at length in the April number of the *Journal of Indian Archipelago*, 1851, p.p. 193-203.

† This is evidently a mistake, although taken from Mr. Dickens' own manuscript, for the records and some of Mr. Dickens' own letters shew that he arrived here on the 7th, *e. g.* see foot-note under heading *Instructions for Native Captains*, ante p. xxiii.

The law of nature is the only law declaring crimes and respecting property, which to my knowledge, at this day exists at Prince of Wales' Island,—and as Judge, it is the only law which I can apply to criminal or civil suits brought in judgment before me—but as the law of nature gives me no precepts respecting the right of disposing of property by wills and testaments, the rights of succession, and inheritance, and the forms and precautions necessary to be observed in granting probates of wills and letters of administration to intestates effects or respecting many other things which are the subject of positive law, I have often been much embarrassed in the execution of my duty as Judge in the Court of justice in which I preside, and many cases there are in which I am utterly unable to exercise jurisdiction.

7. The cultivation of this island, the increase of its commerce, and of its population, has made it necessary that fixed laws of property as well as laws declaring what acts are crimes, should be promulgated by due authority. The inhabitants before my arrival had, I am told, their causes more quickly decided, and summary hearings no doubt, have their advantages, but my judgments until confirmed are not valid. Formal and plenary proceedings are therefore now necessary, not only to protect the liberty and property of the people, but also to protect the character of the Judge, who must shew on the face of his judicial proceedings the whole subject-matter of his decisions. This creates to me incalculable labor and some delays, and it has been one of the causes of my addressing his Excellency in Council, and the Lieutenant-Governor of this island, with a view to the enacting of a Code of Criminal and Civil Municipal Law.

8. Thus, on the 31st August, 1801, I addressed a letter to the Lieutenant-Governor, a copy of which letter I had heretofore the honor of transmitting to his Excellency in Council, and I now beg leave to refer thereto for further particulars. Thus, on the 25th October, 1801, I represented to his Excellency in Council that to prevent disturbance and tumult, a positive law was immediately requisite, declaring the rights of succession and inheritance; the law of wills, and the mode of granting probates of wills and letters of administration to the effects of persons dying intestate. And that it was necessary that the Magistrate or some other person should be empowered as Ordinary to take possession of the real and personal property of persons dying intestate on the Island, or where they left executors who were absent, and to hold the same *in usum jus habentis*, till a proper person appeared to administer the estate, not only because great frauds in this respect were said to prevail, but because the creditors of the deceased could not obtain payment of their just debts, no one appearing to administer, and no one being authorized to act in the premises. And thus again, I ventured to address his Excellency in Council on the 1st and 23rd January—on the 6th and 18th February, and on the 1st March, 1802, and I now beg leave for further particulars to refer to the said letters, and their several and respective enclosures, which are I believe, Sir, on record in the Office of the Chief Secretary to the Government at Fort William.

9. On the 6th May, 1802, I had the honor of receiving a letter, dated 23th January, 1802, signed C. R. Crommelin, Secretary to the General Public Department, informing me by the directions of the Vice-President in Council, that all my letters should be addressed to the Lieut.-Governor, on whom it would depend, if he should deem it proper, to transmit them to Government, with such observations as he might judge it to be necessary to submit, respecting them.

10. On the 7th May, 1802, the Lieutenant-Governor requested my attendance at the Government House, and there communicated to me the contents of a letter addressed to the Lieutenant-Governor by the directions of the Hon'ble the then Vice-President in Council, and dated the* February 1802, and signed C. R. Crommelin, Secretary, by which letter the Lieutenant-Governor was desired with the least possible delay, and with the assistance of the Judge and Magistrate, to prepare and transmit for the approval and confirmation of his Excellency in Council [and without waiting for the completion of the whole code thereby required] Drafts of such laws and regulations, as most urgently required legal provision; even on this occasion, the Lieutenant-Governor did not honor me with any communication of his sentiments, but preserved such a solemn silence on the subject referred to our mutual labors, by the letter of Mr. Secretary Crommelin, that I confess I was at that time greatly surprised. Yet as Mr. Secretary Crommelin's letter to me had informed me, that no communication was to be made to his Excellency in Council, but what the Lieutenant-Governor deemed proper, I contented myself with drawing "A Regulation for the punishment of certain crimes and misdemeanors therein mentioned, and which should or might be committed at any time after the due promulgation of that regulation by any person or persons therein particularly mentioned, and described at Prince of Wales' Island, the islands and territory thereto subordinate, and the high seas within the limits and jurisdiction

LARTH.
1800-1802.

DICKENS,
J. & M.

* Date left blank in Court copy.

LEITH.
1830—1838.

TICKENS,
J. & M.

"thereof." And another "Regulation for the establishment of an efficient Police "at Prince of Wales' Island, the islands and territory thereto subordinate." And as the Lieutenant-Governor did not make any voluntary communication of his sentiments on the subject mentioned in Mr. Crommelin's letter, the Judge and Magistrate, did not think it either respectful to the Lieutenant-Governor, or fit for the Judge and Magistrate to intrude upon the Lieutenant-Governor [when the Judge and Magistrate was at the Government House] his unrequired sentiments on the subject; but on the 1st June, 1802, I addressed a letter to the Lieutenant-Governor conveying at large my sentiments on the Civil Code required by Mr. Crommelin's letter, and transmitting at the same time the drafts of the two aforesaid regulations, and requesting that the Lieutenant-Governor would transmit a copy of my letter of the 1st June, 1802, and the drafts of the aforesaid two regulations if he deemed it proper so to do to his Excellency in Council. In my letter of the 1st June, 1802, having detailed at large my ideas on the subject, I then also requested that the Lieutenant-Governor would furnish me with his specific instructions for the Civil Code, or that he would generally refer the subject for the decision of his Excellency in Council, as to the principles upon which it was to be framed. To that letter of the 1st June, 1802, the Lieutenant-Governor did not deem it proper to return me any answer. No, not even an acknowledgment of its receipt, and to this hour, I am ignorant whether he has or has not transmitted it or the aforesaid regulations to his Excellency in Council, the Lieutenant-Governor having ever since that time preserved an *altum silentium* on this subject.

11. When the Lieutenant-Governor was about to return to Fort William, that is on the 20th November, 1802, again I addressed to him a public letter representing at large the inconveniences resulting to the society here settled from the want of fixed Civil laws, and praying that the Lieutenant-Governor would be pleased to lay these inconveniences before his Excellency in Council, I am at this day ignorant whether the Lieutenant-Governor has complied with the wishes of the people and my request; on this subject also he has preserved an *altum silentium*.

12. I now come to the time when Mr. Phillips, Secretary to the Lieutenant-Governor, took charge of this Government. The Lieutenant-Governor left this island on the 2nd December, 1802;—and the late acting Lieutenant-Governor on the 18th December, 1802, of his own authority, promulgated a regulation * which, on the 2nd April, 1803, he required of me as Judge and Magistrate of this island to receive in the Court of Adaulet, and to act therein in a criminal case wherein a man of the name of Carni was charged with theft. Previous to the promulgation of this regulation, that is to say, on the 14th December, 1802, I was consulted by the late acting Lieutenant-Governor on the subject of passing such a regulation, and I then gave my opinion that the late acting Lieutenant-Governor had not any legal power to promulgate any such regulation as law, previous to its being approved and confirmed by His Excellency in Council; and on the 3rd April, 1803, I had occasion to repeat that opinion in a public letter that, day written by me to the late acting Lieutenant-Governor. On the 5th April, 1803 the said Carni was tried before me as Judge in the Criminal Court, and acquitted of the said charge alleged against him, because no evidence whatever was produced against him which, upon the general principles of evidence received in the Courts of England, and on the Continent of Europe could justify a verdict of guilty. The late acting Lieutenant-Governor, after Carni had been tried and acquitted before me as aforesaid, sent for Mr. Manington, his second assistant, and examined him at the Government House in the absence of Carni, and then, upon the second assistant's deposition, found Carni guilty of offending against the said regulation of the 18th December, 1802, and sentenced Carni to 4 months' imprisonment and hard labor on the public works, and the late acting Lieutenant-Governor actually carried that sentence into execution. As the late acting Lieutenant-Governor heretofore, has informed me that he would transmit the proceedings in the case of Carni and the correspondence between us on that subject to his Excellency in Council, it is only necessary for me now to remark that I refused to receive the late acting Lieutenant-Governor's regulation of the 18th December, 1802, as a law in the Criminal Court of Justice in which I sat as Judge,—first—because it had not been approved and confirmed by his Excellency in Council, and secondly, because it appeared to me unjust, unreasonable, and repugnant to the laws of the realm of England.

13. On the 21st April 1803, the late acting Lieutenant-Governor addressed to me a public letter stating that in order to prevent delay in the prosecution of revenue causes [at present unavoidable as it was there said] in the Adaulet from the multiplicity of business brought before that Court, the late acting Lieutenant-Governor had thought it expedient to insert a clause in the regulations for the

* ante p. 15.

forms of the approaching official year signifying that all such causes would in future be heard by the first Civil Assistant, or such other officer of Government as the Lieutenant-Governor might nominate for that purpose, whose proceedings would be submitted to the Lieutenant-Governor for his sanction or disapproval, and on that occasion I thought it my duty to state in reply,* that the clause referred to, appeared to me likely to affect the dignity and efficiency of the Office of Judge and Magistrate, and the purity of the administration of justice in this island,—and I now desire to state for the information of his Excellency in Council, that there were no causes at that time in arrear in the Court of Adaulet, that I had never complained to the late acting Lieutenant-Governor of want of leisure to hear revenue causes; and that from circumstances I am induced to think the reason assigned, that is to prevent delay, was merely ostensible. I beg leave also to submit to his Excellency in Council, my opinion on the spirit of this clause, which seems contrary to the principle on which approved writers state, all revenue laws should be framed,—which is, that justice should be the primary, and revenue only the secondary object of such laws. To effect this, the Judge should be as independent as possible, of both the parties to a revenue cause,—but in a question between a farmer of the revenue, and a subject of the Government, the farmer of the revenue always represents, that if he is not supported in his prosecution of abuses, he will be unable to pay his rent, and, although the farmer of the revenue is the nominal complainant, it generally happens in point of fact, that the interest of the Government is involved in the cause. I cannot therefore think that justice was likely to be better administered in revenue causes, by an assistant to the Lieutenant-Governor [whom I do not mean in any manner to disparage] than by a Judge who would act independently of the orders of the Lieutenant-Governor.

14. I now come to the period when the Lieutenant-Governor returned to this island, on the 12th May, 1803, and I had flattered myself that he would have returned with a code of laws and regulations. When I was disappointed in this hope, I still ventured to think that from his known access to his Excellency the Most Noble the Marquis Wellesley, I should at least have received some communication from the Lieutenant-Governor, making it easier for me to proceed in the laborious task of deciding in the Court of Adaulet, such causes as are the subject of positive law, and not of the law of nature, but again I was disappointed. I testified the greatest respect to the Lieutenant-Governor on his return to this island on the 12th May last, but it was impossible for me not to observe the marked coolness with which, upon my first visit of ceremony, I was received by the Lieutenant-Governor. I lamented the cause, for I supposed the late acting Lieutenant-Governor previous to the Lieutenant-Governor's disembarkation, had communicated our correspondence in the case of Carni, and to this communication, I imputed my cold reception by the Lieutenant-Governor, but whatever my private feelings were, I did not suffer any other consideration than that of public duty to influence my public conduct as Judge. Soon afterwards, on the 21st May, the case of Hough occurred. Hough was accused of theft, and tried before me, and acquitted for the same reasons as Carni was acquitted,—the charge not being proved. And the Lieutenant-Governor did in Hough's case, what the late acting Lieutenant-Governor had done in the case of Carni. I therefore thought it my duty to request the Lieutenant-Governor to lay before his Excellency in Council, a copy of the proceedings in Hough's case. But as the Lieutenant-Governor did not deem it proper to communicate to me, whether or not he would, according to my request, transmit the proceedings to his Excellency in Council, I am ignorant of his intentions therein. I further beg leave to state for the information of his Excellency in Council that, on the 2nd June, 1803, the case of Palangee v. Tye Ang†, came before me in the Court of Adaulet, and the plaintiff's bill was dismissed, but the Lieutenant-Governor afterwards, directed the defendant to pay a sum of money into the Treasury, and actually administered to the effects of one Ethergee, deceased, named in the plaintiff's bill, without any communication with the Judge on the subject, the Secretary of the Lieutenant-Governor giving his directions immediately to the Provost.

15. On the 7th June, 1803, the cause of Cauder v. Ibrahim‡ came on before me, in the Court of Adaulet, and the proceedings in this cause, with the correspondence between the Lieutenant-Governor and the Judge and Magistrate, [as I understand,] by the Lieutenant-Governor will be herewith transmitted. In this case, it will appear, that a question incidentally arose on a paper promulgated on the 1st May, 1800, by the Lieutenant-Governor, which paper was entitled "Instructions to

LARRY.
1800-1806.

—
DICKINS,
J. & M.

* Letter dated 22nd April, 1803, duly recorded, but not here given.

† *Supra* p. 19.

‡ *See* p. 22.

LEWIS.
1800—1808.

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DICKENS,
J. & M.

the Native Captains—," and it will appear that the Lieutenant-Governor thought proper after a period in the cause, to depart from the accustomed mode of delivering judicial opinions, and directed his Secretary to write to me a letter, in which I am addressed rather as if I was an assistant to the Lieutenant-Governor, and subject to his orders, than as Judge and Magistrate of this island, and in which I am questioned as if I had committed some fault by omitting some act, which I ought to have done, and which seems to have been some act supposed necessary to give effect to the Lieutenant-Governor's instructions to the native Captains,—but on this head, I beg leave to refer to the letters themselves, which will shew the facts. By Mr. Secretary Phillips' letter, dated the 14th June 1803, the Lieutenant-Governor has charged the Judge and Magistrate, in discussing this incidental question [originally raised in the cause of *Cauder v. Ibrahim*, and revived in the correspondence] with making improper, and unbecoming observations, and, by Mr. Secretary Phillips' letter, dated the 17th June, the Lieutenant-Governor has charged the Judge and Magistrate with writing to the Lieutenant-Governor with an evident design of conveying disrespect to him, and the Lieutenant-Governor has therein declared his intention of submitting the proceedings in the case of *Cauder v. Ibrahim*, and the correspondence on the incidental question which thereon arose, to his Excellency in Council. It is therefore, that I now request, that you will assure his Excellency in Council, that I am absolutely incapable, of such weak, unmanly, and unbecoming conduct as that imputed to me, that is to say of intentionally writing in my official character of Judge, anything unbecoming, improper, and disrespectful to the Lieutenant-Governor; that I feel assured his Excellency in Council will consider my language, though manly and firm, yet to be decent and respectful, and such as became the Judge and Magistrate to write on that occasion. Permit me to add that I felt myself bound by every sense of duty and gratitude to his Excellency in Council [who had done me the high honor of appointing me to the office of Judge and Magistrate, and of recording to my credit the reason of this appointment] to resist every indignity offered to the office of Judge and Magistrate. And I beg you to assure his Excellency in Council, if I have erroneously viewed this subject by being placed too near it, that I have only to answer for the imperfection of my language, for my intention certainly never was to write anything disrespectful to the Lieutenant-Governor; and I trust the conduct I have observed since my appointment to the office of Judge and Magistrate will repel this accusation. On this head, I appeal to the Lieutenant-Governor himself, and I am not afraid the Lieutenant-Governor can object to me, misconduct of any kind,—if he can, I do not on this occasion, implore his forbearance, but I greatly lament, that the necessary effect of the treatment I have received, may be to bring my jurisdiction into contempt, and to throw suspicion on my character.

16. I beg of you to assure his Excellency in Council, that nothing less than an occasion in which the welfare of this society, and my own character are involved, would have led me to take up so much of his time, as must be consumed in hearing the contents of this letter,—but on the letter itself, this apology must rest, if its contents have not the importance which I have annexed to them, I confess I am without any other apology.

I have, &c.,

JOHN DICKENS,

Judge & Magistrate.

Nothing in the records can be found to shew what steps were taken in consequence of Mr. Dickens' letter to the Government of India, but no doubt, it hastened the new arrangements which were made in 1805, for the Government of the Island. The records however, contain endless correspondence between Mr. Dickens, the Lieutenant-Governor and the Government of India, in connection with the state of the law, in regard to which, Mr. Dickens seems to have been determined to bring about an improvement. He prepared and submitted regulations, which were forwarded to the authorities in India, and by the latter returned to Penang for further information or otherwise—time thus went on without any change being effected, and some of the draft regulations are still to be found amongst the records of the Court in Penang.

The following, written by Sir George Leith in 1804, shortly after his relinquishment of duties in Penang, apart from shewing the state of the law during his tenure of office, especially in its application to Europeans, goes in support of what has already appeared herein, and moreover, most forcibly shews, what to this day is a fact, how little imprisonment acts as a deterrent to Asiatics generally :

"The total want of an efficient Code of Civil and Criminal Laws, has long been severely felt at this Settlement. In the great variety of people who compose its population, it must be supposed, that numbers will readily embrace the opportunity here unfortunately presented to them, of practising the most nefarious acts, when they are sensible, no power exists to coerce or restrain them. This observation applies particularly to all those who are not included under the general, but indefinite expression of natives, as no European can be imprisoned for debt, nor even sued for it ; while on the other hand, he has the power of recovering any money which may be due to him from any native : that is, every man who is not considered as an European ; and the consequences naturally to be expected from such a state of things, have been but too often experienced. No difficulty has ever occurred in settling, even by the present defective Regulations, every dispute of a civil nature, wherein natives only were concerned, or where they were only defendants ; but then, there is no redress for them against the many usurious and shameful practices which some Europeans are but too ready to employ ; nor can one European recover against another, in the Court established here, even upon the clearest and most undisputed plea.

The want of a Criminal Code has been also a serious evil to the community at large : many persons are now, and have been for a long time confined in Jail, charged with Capital Crimes, without the means of bringing them to trial. * Most of these above alluded to, are confined for murder, and a very large majority of them, upon their own confession ; and the rest have been confined upon such strong presumptive evidence, as rendered it impossible to liberate them ; and enormities have been committed but too often, which are too shocking to mention ; and there is too much reason to fear that these will frequently be renewed, unless due means are provided for the punishment of such crimes in the manner they deserve ; and that as soon after their commission as a due attention to Justice will admit.

Imprisonment for any length of time, however dreadful the idea is to an European, is by no means considered by the natives of Asia in general, in the same light, and least of all perhaps by a Malay, who, while he is fed, and permitted to sleep undisturbed, cares very little for the loss of his liberty. Most of the murderers are Malays.

The Lieutenant-Governor was ordered in his Instructions, to frame a Code of Laws for the future government of the Island : He accordingly transmitted a draft of some Regulations, for the better administration of justice in Civil causes, and in Criminal ones, where compensation could be made by damages. The subject of Criminal Law relating to Capital Offences, was not entered upon. The great and important political events, and the variety of pressing business which constantly occupy the attention of the Supreme Government, have hitherto prevented these Regulations from being promulgated. The Code was drawn up with every possible degree of care and attention, and with the most anxious solicitude, to offer a remedy for the many evils which now exist. Defective as the proposed Regulations undoubtedly were, it was nevertheless hoped they might do some good, and serve till a more perfect Code could be framed.

In making Regulations for the interior Government of Prince of Wales' Island, the most particular attention should be paid to its situation ; to the People who compose its population ; their Habits, Manners, Customs and Prejudices, should be consulted † ; everything which relates to their Religious ceremonies ; domestic disputes, and recovery of debts among each other to a certain amount, ought to be left to themselves, but under fixed and well defined Rules and Regulations, which should be made as public as possible, to prevent a deviation from them. The great division of the natives, as at present, should each have a Captain, who becomes more

Letter.
1800—1805.

—
Dickens,
J. & M.

* A system which lasted till the proclamation of the Charter—see § 92 of Governor Dundas' Despatch, 12th November, 1805, *infra*.

† See different Charters—also see § 69 of despatch of Court of Directors, Chap. iii. *infra*.

FARQUHAR immediately responsible for their conduct; the beneficial effects of such an Establishment are too well-known to require to be particularly enumerated” *

**DICKENS,
J. & M.**

Sir George Leith was succeeded by Mr. Robert Farquhar as Lieutenant-Governor on the 1st of January, 1804. Sir George Leith signed the Court Books for the last time on the 31st December, 1803. Mr. W. E. Phillips continued as Secretary to the Government. In a letter to the Governor-General, dated 16th April, 1804, Mr. Farquhar alluded to the want of reform in the administration of justice, he said:—

“ § 9. With respect to the internal economy of the Government, I feel it my duty to submit to your Excellency’s attention, the great and increasing difficulties that this island labors under, from its remaining without any regular Courts of Jurisdiction. The state of the Police is so lax and inefficient that neither persons nor property are secure, and crimes and misdemeanors are daily committed with impunity, from the want of adequate powers on the spot to punish delinquents according to their deserts. As Your Excellency however is fully informed of the evil consequences resulting to this Settlement from the want of a code of regulations to enforce the observance of laws, and a respect for the peace of society, and as several plans have already been submitted to Your Excellency’s consideration, I shall not again intrude further than to respectfully solicit the early transmission of Your Excellency’s orders on this subject.”

and on the 27th September, 1804, Mr. Farquhar received a letter from Lord Wellesley, to the effect that “ a code of regulations for the administration of civil and criminal justice, and for the establishment of an efficient Police at Prince of Wales’ Island, had been under the consideration of the Governor-General in Council for some time, and that the Governor-General in Council proposed at an early period to pass them into laws for the general government of the Settlement.” Codes were framed, but nothing however came of them, all being re-submitted for the ultimate decision of the Governor-General.

CHAPTER III.

CONTENTS.

1803—1808.

Penang made a separate Presidency—Arrival of first Governor, Mr. Phillip Dundas, and Council—Despatch of Court of Directors on Administration of Justice—Mr. Dickens’ memoir—Despatch of Governor Dundas, and Council—Sentences of death not carried out—lengthy detention of prisoners—Ordinary created—native laws and usages—illustration case—*Ramalinga Putty v. Mootee Samee*—illustration of similar case before Mr. Justice Ford—Mr. Dickens’ complaint to Mr. Raffles regarding a European named Douglas—lays stress on the want of jurisdiction over British subjects—Governor discontinues system of personal correspondence with Judge and Magistrate—letters and cases signed and countersigned by Mr. Raffles as Assistant or Acting Secretary—other duties of Mr. Dickens—Court of Judicature—Mr. Dickens’ Court closed—extract from his last Court Book—his departure.

**DUNDAS.
1805—1807.**

In 1805, the Government of India determined upon forming Penang into a separate Presidency, and in September of that year, the first Governor, Mr. Phillip Dundas, and Council arrived. The first Council was held on the 20th of that month. The following

* *A short account of the Settlement, &c., of Prince of Wales’ Island in the Straits of Malacca.* Sir George Leith, Bart, Major 17th Foot, and late Lieutenant-Governor. London, 1804.

is an extract from the despatch of the Court of Directors establishing the new Government, under heading

ADMINISTRATION OF JUSTICE.

DUNDAS.
1805—1807.

DICKENS,
J. & M.

§ 63. The administration of justice being a very important part of the arrangement required for the better government of Prince of Wales' Island, we have presented an humble petition to his Majesty that he will be graciously pleased to grant a *Charter for the administration of justice* in Prince of Wales' Island, by erecting the Governor and Council with the assistance of a Recorder, into a Supreme Court of Judicature.

69. When we consider that at the time we took possession of Prince of Wales' Island, it was uninhabited, our right to prescribe the system of laws which we may deem most eligible for the government thereof, cannot be controverted, since none of its inhabitants who have repaired to the island, can claim any prescriptive right, founded on ancient usage, to the establishment of any particular system of laws or form of judicial proceedings. The establishing, as far as may be possible, of one regular system of laws for the various descriptions of inhabitants, *with a proper attention to their respective customs and manners*, * seems to be the most politic mode that can be adopted under the present circumstances of the island, you will therefore, transmit to us, from time to time, such regulations and laws as you may think proper to issue for the internal government of the island.

On the 22nd October, 1805, Mr. Dickens addressed a "Memoir with respect to the enactment of laws, Civil and Criminal, and the establishment of Civil and Criminal Courts of Justice," and at the same time transmitted drafts of four regulations to the Governor in Council. At the end of his memoir, Mr. Dickens says: "As a Charter of Justice, granted by the King for Prince of Wales' Island, is expected to arrive before the close of this year; Mr. Dickens is aware, that the four regulations accompanying this memoir may be useless. Mr. Dickens however respectfully submits them, and the facts stated in this memoir, as a proof that for five years and upwards, his endeavours have been constantly exerted to fulfil the duties of his station as Judge and Magistrate of Prince of Wales' Island."

In their first despatch to the Court of Directors, dated 12th November, 1805, the Governor and Council of the Presidency, made the following allusion to the administration of justice, which, it will be seen, sets out the state of the law at the latter end of 1805.

ADMINISTRATION OF JUSTICE.

§ 87. We look with impatience for the arrival of His Majesty's charter for the administration of justice at this Presidency. The Charter is so indispensably necessary, that without it, we venture to predict that the prosperity of this Settlement cannot be permanent. It will be deserted by all orderly, and will become an asylum for the flagitious and the enemies of government and law.

88. If unfortunately the granting of this charter should by any circumstances be delayed, we shall deem it our duty to exert the authority vested in us for restraining the turbulent and punishing the disobedient of the European part of our inhabitants, in any case where the exertion of primary authority may appear to us requisite.

89. The only power we found on the island, bearing the appearance of a regular administration of justice was lodged in the office of the Judge and Magistrate, who, in conformity to certain regulations established under the authority of the

* See the different Charters: "The said Court shall have and exercise jurisdiction as an Ecclesiastical Court, so far as the several Religions, Manners and Customs of the inhabitants will admit....." and "make Rules and Orders....." with an especial attention to the different Religions, Manners and Usages of the persons who shall be resident or cormorant within its jurisdiction. . . ."

DUNDAS.
1805-1807.

DICKENS,
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Government General, by whom he was appointed, decides or rather gives his opinion on all suits where the parties, or at least the defendants, are not Europeans—this opinion became a sentence on being confirmed by the Lieutenant-Governor, who also had the power of reversing and altering the same if he thought proper.

90. Petty thefts, assaults, and in general all crimes, not amounting to felony, are tried in the same manner, and the convicted punished under the sentence.

91. To prevent the total cessation of everything in the form of an administration of justice, we have for the present authorized the Judge and Magistrate, Mr. Dickens, to continue in office with the same allowance he has heretofore received, amounting to Rupees 2,000 per mensem, under the regulations and instructions he has heretofore acted upon, submitting his opinion to us for our confirmation or otherwise.

92. In all cases of accusation amounting to felony, the accused are tried under the above regulations, by a Court consisting of the Governor, the Judge and Magistrate, and a third person summoned by them, who report their opinion to the Government General. The accused, if found guilty, are committed to close confinement. We can only be induced to bring cases of this nature to trial, in the hope that the party accused may be found innocent, and consequently liberated, as it appears that the Government General in no one instance since the institution of this Court, if such it can be called, have passed an order for execution on the sentences referred to them, or even taken any notice thereof, from which circumstance there now remains in gaol, 21 convicted murderers likely never to be punished.*

93. The above relates only to such cases where natives are the parties, while the more turbulent European remains on the island free from all restraint, with power of committing every act of injustice and irregularity towards his neighbour, and the most peaceable native, having set at defiance all authority as not legally established on the island."

On the 27th December, 1805, the Governor and Council passed

* An examination of the records shews this to have been really the case and the system apparently lasted till the proclamation of the Charter, for at a Session of Oyer and Terminer held on the 10th October, 1809, 13 prisoners [2 of whom were women] were "returned upon the Calendar to have been committed on charges of "murder, since the year 1797 by former authorities which exercised jurisdiction "here, antecedent to his Majesty's Charter The Court remanded the "several prisoners, and declined to pass any sentence before Tribunals which were "not legally authorized to try them," and see the following, which relates to one of the women-prisoners, who had been 12 years in custody without any apparent charge against her.

"9TH DECEMBER, 1809.

Present:

THE HONORABLE SIR EDMOND STANLEY, KNT., RECORDER.

The King against Mai.

The prisoner Mai was brought up this day, and set to the Bar, when the several petitions presented by her, and which laid over for consideration were read, together with the report of the Registrar and Clerk of the Crown, of there being no charge of any kind or description against the prisoner in the Crown Office, and the record of the proceedings of the 1st August 1797, before Forbes Ross McDonald, then Superintendent of Prince of Wales' Island, George Caunter, Esquire, Magistrate, and Philip Manington, Esquire, second-assistant to the said Superintendent, being the trial and conviction of one Loungh, a Malay, for the murder of one Che Chute, and also the examination of Mai, the prisoner, as an evidence upon the said trial. It appearing that there is no color of charge against the prisoner Mai, who has remained in confinement since the year 1797; it was ordered that the said Mai be discharged out of custody upon the terms of entering into a recognizance, herself in \$500 and two sufficient securities in \$250 each for 5 years, and also for her appearance hereafter in this Court, if found necessary, and when required, to plead his Majesty's pardon."

These prisoners are last mentioned in the records on the 4th June, 1810, when several of them "offered to transport themselves out of this island, upon the terms of their being discharged from further imprisonment, which offer was accepted by the Government, but the Court declined making any rule in their case, there being no charges before the Court against them." On this subject, see also, time of Stanley Esq., *infra*,

a "Regulation creating and establishing an Ordinary," and from that date, Mr. Dickens acted in that capacity, the books and records of the Court, bearing his signature as such up to the opening of the Court of Judicature in 1808.

DICKENS.
1805-1807.

DICKENS,
J. & M.

Native laws and usages seem also to have been given full effect up to this period. The following case, tried a few days before the establishment of the new Government, gives such an instance, nor is any apology offered for citing it, as it is only given as an illustration of similar privileges, which are up to the present day granted by the Supreme Court to natives, when they apply for same in Civil cases, *viz.*, of being allowed to go to some sacred spot or place to take an oath in justification of their claim or conduct.

COURT OF ADAULET.

12th September, 1805.

Ramalinga Putty v. Mootee Samee.

Claims \$ 54 as his share in a lime-kiln and for partnership accounts.

The defendant after having been *sworn on water and vegetables*, denies the claim.

The plaintiff appears to me either stupid or knavish, and I find it impossible to make myself understood by him, or he from some secret purpose declines answering the questions proposed to him for the purpose of elucidating his case. The plaintiff at last proposed to go to the *kramat* * and there to swear to the truth of the balance really due to plaintiff, and the defendant consenting to this, I think the Chooliah interpreter should go with them, and there compromise the matter between plaintiff and defendant.

JOHN DICKENS,

Judge & Magistrate. [a.]

Approved.

R. T. FARQUHAR,

Lieut.-Governor.

On the 21st December, 1806, Mr. Dickens writes an amusing letter to "Thomas Raffles, Esquire, Acting Secretary to Government," for the information of the Governor and Council, complaining of the treatment he had received early that morning from a European, a Mr. Douglas, who had accosted him whilst out

* A shrine.

[a.] The following is one of the instances alluded to above, and of recent date. The case is taken *ver. et lit.* from the learned Judge's book in Penang.

[Before Mr. Justice Ford.]

April 13, 1833.

Lim Guan Teet v. Yew Boh Nes & anor.

Action on a Promissory Note.

Execution denied.

Thomas, for Plaintiff.

Defendant in person.

By consent of both parties, if plaintiff goes to swear according to Chinese custom by cutting off head of a cock, and burning joss sticks before the temple in Pitt Street, he shall have verdict, if plaintiff refuses to do so, there will be verdict for defendants.

The Interpreter of the Court directed to accompany the parties.

Arrangement tumbles through, priest of temple declining to allow.

April 18th.

Verdict by consent for \$150.

DUNDAS.
1805-1807.

DICKENS,
J. & M.

driving, and "required an explanation and satisfaction of him" in regard to a case tried by him the day previous, and in which he, Douglas, had appeared as defendant. After relating certain facts in regard to Douglas, Mr. Dickens concludes his letter by expressing regret at the want of authority over British subjects. The following is an extract from the letter in question :

GEORGE TOWN,
21st December 1806,
9 o'clock A.M.

To

THOMAS RAFFLES, ESQUIRE,

Acting Secretary to Government.

SIR,

It is with real concern that I am again obliged to request that you will represent to the Hon'ble the Governor and Council, that this morning Mr. Douglas, an inhabitant of this island, was guilty of a wanton outrage on me, in my public character, as *Judge* and *Magistrate*, for the *judicial* conduct which, in obedience to the orders of the Honourable Board, it has fallen to be my duty to observe towards him in the various suits lately preferred by and against him in the Court of Justice over which I preside.

2nd.....

3rd. Mr. Douglas heretofore took the liberty of addressing a letter to me in my official capacity, on the cover of which I wrote that all official applications should be made in person, or by attorney constituted in writing, and affixed to this writing the seal of the Court. Notwithstanding this notice, the day before yesterday, Mr. Douglas directed a letter to me, omitting on the direction my official character, which letter enclosed an extract of a letter from Mr. Acting Secretary Raffles to him, conveying a reprimand, and called on me to state, why such a reprimand had been given him by the Honourable the Governor and Council. I did not reply to this letter, but yesterday in open Court, where Mr. Douglas appeared as a defendant to a suit instituted against him, I addressed myself to him, and observed, that the proceedings on which the Honourable Board *had exercised their judgment* were those signed by himself, all which he had heard, read. And that I knew not by what right he presumed to call on me to explain why the Honourable Board reprimanded him, and that I was surprized he should take the liberty of writing to me a letter on such a subject, after I had stated to him that I did not receive any letter on official business, and that it was extremely improper in him to address a letter directed to me as a private individual on a public judicial subject.

4th. I also stated to Mr. Douglas, that he must be aware that he had sworn before me, that he believed Varshay died without a Will, and that his affidavit *was on record*, when it afterwards appeared that at the time he, Douglas, made the affidavit, he had a Will of Varshay's in his possession, and which he afterwards produced, on which Will, there was endorsed in the English language and character, two endorsements—one in pencil "Varsey's Will," the other in ink, "Supposed Will of Varsey Mahomed." *

5th. Mr Douglas thought proper to declare in open Court, that he did not come thereto be reprimanded by me. Upon which I observed to him, that if he wished it, I would make a minute on the proceedings of these circumstances, and submit my conduct therein to the judgment of the Hon'ble the Governor and Council, as he was not subject to my *ordinary* jurisdiction. Mr Douglas, not appearing to wish that I should enter such a minute, it did not appear on the proceedings of yesterday's Court.

6th. A little before 7 o'clock a.m., of this day, near to the new Convict lines, I met Mr. Douglas, on horse-back, being myself in a carriage. Mr. Douglas

* This affidavit is on record and the following extract from it goes in support of the above letter : " The petition of James Douglas, Esquire, sheweth, that Varshay Mahomed, late of Prince of Wales' Island, merchant, sometime on or about the "first day of November, 1806, departed his life at sea without a Will, &c.,....." *In the lands and Goods of Varshay Mahomed, deceased, 6th December, 1806. [not reported].*

addressed himself to me, requiring an explanation and satisfaction for my conduct to him in Court. I told him I was surprised at his daring to interrogate me in that manner, and that I would not permit him, or any man, to expect that I would explain to him my official conduct as Judge, upon which he threatened me, saying "he would have ample satisfaction," and swearing "he would have my blood." Human nature is frail, and I confess that I was wrong in my reply. I told him, "he was a scoundrel," and that he had now an opportunity, "and that if he had the spirit to do it—" why did he not now take his revenge?" His answer was, "he had no pistols, but if he had he would."

Douglas.
1806—1807.

DICKENS,
J. & M.

7th. Having narrated these facts, and apologized for the momentary irritation occasioned by the wanton attack made on me by such a person, I can only repeat, that this event furnishes another instance of the injurious effects resulting from the Honourable the Governor and Council, compelling me to examine into complaints against British subjects, whose respect and obedience to my judicial opinion I not only cannot command, but who think themselves authorized to resent as a private personal injury, the judicial duties I perform in obedience to the injunctions of the Honourable the Governor and Council. *

I have, &c.,

JOHN DICKENS,

Judge & Magistrate.

There is nothing on record, to shew that Mr. Dickens received an answer to his letter, doubtless because the authorities themselves were powerless to act.

Under the new Government of 1805, the Governor discontinued the system of personally corresponding with or countersigning or remarking upon the decisions of the Judge and Magistrate, and the correspondence and cases all bear the signature of Thomas Raffles, either as "Assistant," or "Acting Secretary," with the annotation "Approved," or "by order of the Governor and Council." From this period the Court papers also bear the impression of a seal, with the words "The Seal of the Judge of the Court of "Prince of Wales' Island." The records, from a very early period, also shew that Mr. Dickens, apart from local codes or regulations, was also consulted by the authorities on matters of local importance.

Among other duties performed by the Judge and Magistrate, he had, by a Proclamation of the Lieutenant-Governor, dated 21st September, 1801, and another of the Governor, dated 15th March, 1806, to take acknowledgments of all conveyances and mortgages of lands, these being subsequently registered in a "Register of "Transfers," kept in accordance with the proclamations. Some of these Registers are still to be found among the records of the Court. Mr. Dickens' career, closed with the opening of the Court of Judicature, which, it will be remembered, was first mooted by the Government of India in their despatch to the Board of Directors, dated 2nd September, 1800.† The following is taken from

* The 2nd para. of this letter mentions another matter not immediately connected with Douglas, and the same not being traceable in the records, the para. is here left out. The above letter will however be found published *in extenso* in the *Journal Indian Archipelago*, October 1852, vol. vi., p. 632.

† ante p. xiii.

DUNDAS.
1805—1807.

Mr Dickens' last Court Book :

" 31st May, 1803.

DICKENS,
J. & M.

The Court met pursuant to its last adjournment, and the Judge and Magistrate having received information from the Governor and Council, that Sir Edmond Stanley, Knight, Recorder of Prince of Wales' Island, had arrived at that place, bringing with him his Majesty's Letters Patent, establishing a Court of Judicature for Prince of Wales' Island, and that the said Court would this day be opened and proclaimed, and that on such opening, this Court would be abolished, this Court therefore, is now declared to have ceased and determined for ever.

JOHN DICKENS,

Judge & Magistrate.

Mr. Dickens shortly after this left for India, and with him ended the most lawless period of the Settlement of Penang, and greatly through his untiring energy and exertion must be attributed the hastening of the grant of the first Charter.

CHAPTER IV.

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First Charter of Justice.

1808—1826.

SIR EDMOND STANLEY.

1808-1816.

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SIR GEORGE COOPER.

1817.

Sir George Cooper succeeds Sir Edmond Stanley—remains in Penang but a few months—important cases tried by him—dismissal of petition by Charles McKinnon, "Principal Surgeon of Hon'ble Co.," regarding alleged libel on him in Governor Petrie's Will.

SIR RALPH RICE.

1817—1824.

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SIR FRANCIS BAYLEY.

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1824—1826.

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1ST CHARTER.

STANLEY E.

1808—1816.

The *Letters Patent* establishing the Court of Judicature in Penang, are dated 25th March, 1807. By the Charter, the Court consisted of "the Governor, 3 Counsellors and a Recorder" as Judges, the Recorder taking precedence next to the Governor. The first Recorder under the Charter was Sir Edmond Stanley *, the Judges of the Court [as at present] being addressed as "My Lord," or "Your Lordship." The Court opened the first time on the 31st May, 1808. The following is an extract from the first Court Book :

Tuesday, the 31st May, 1808.

This day at 10 o'clock, the Honorable the Governor and Members of Council † having assembled, in order to receive Sir Edmond Stanley, Knight, Recorder of the Court of Judicature established for Prince of Wales' Island, proceeded with Sir Edmond Stanley, to the Hall of the Government House ‡ [for the present appropriated as the Court House] and having severally taken their seats on the Bench, His Majesty's Letters Patent bearing date the twenty-fifth day of March, one thousand eight hundred and seven were publicly read.

The Recorder then administered the Oaths prescribed to be taken by the Governor, and tendered the declaration against Transubstantiation which were duly taken and subscribed, and the Recorder and the other Judges of the said Court, having afterwards taken the like oaths, and exhibited similar declarations.

James Carnegy, Esquire, appointed by the Honorable the Governor and Council, first Sheriff of Prince of Wales' Island and duly sworn into that Office before the Governor, Published and Proclaimed the Charter, and the Supreme Court of Judicature, of Prince of Wales' Island.

The Recorder having then delivered over to the Honorable the Governor, His Majesty's Letters Patent establishing the Court of Judicature, to be deposited among the Records of the Island, the Court adjourned till Friday the 3rd of next month."

On the 3rd of June, the Court sat for the first time, the Governor alone taking the Bench with the Recorder. The first case heard, was an Ecclesiastical one, where Letters of Administration were asked for in the Goods of one Andrew Cartwright, deceased.

The Court after this date, and on its different sittings, proceeded to appoint its several officers,—rules and orders were passed, tables of fees fixed, and English pleadings, in both law and equity introduced and followed.

The first Registrar appointed, was Mr. Thomas Raffles, afterwards Sir Thomas Stamford Raffles, the founder of Singapore. The following is an Extract from the Court Records in reference to his appointment.

" Friday, the 10th June, 1808.

This day the Court opened at ten o'clock.

Present :

The Recorder.

Thomas Raffles, Esquire, is appointed occasional Registrar under the Charter

* " And we do hereby constitute and appoint our trusty and well-beloved, Sir Edmond Stanley, Knight, to be the First Recorder of *Prince of Wales' Island*, in Manner aforesaid, the said Sir Edmond Stanley, Knight, being a Barrister in *Ireland*, of five years standing and upwards." *First Charter*, p. 9.

† " Colonel Norman Macalister, Governor, W. S. Pearson, W. E. Phillips, and J. J. Erskine, Counsellors."

‡ Fort Cornwallis.

will further orders, and is sworn into that office, until a legal man who is expected, 1st CHARTER, shall arrive to fill it."

Mr. Raffles however, did not hold his post long, for on the 25th July 1808, the records shew that "Thomas Raffles, Esquire, the Acting Registrar, having gone to sea in consequence of ill-health, Mr. William Young, having been nominated by him to act in his absence in that capacity, is accordingly admitted so to do until further orders." At this period, the Establishment of the Court consisted of the following :

STANLEY R.

1808—1816.

William Young,	...	...	Acting Registrar.
William Robinson,	...	...	Accountant-General. [a.]
James Carnegie,	...	...	High-Sheriff.
Andrew Burchet Bone,	...	...	Deputy Sheriff.

On the 24th of August however, further changes were made, a Mr. William Stuart, becoming Acting Registrar, and Messrs William Young and John William Rolls, Sworn Clerks. The High-Sheriff was annually appointed by the Governor, and the former appointed his own Deputy.

The first Law-Agent of the Court, admitted under the Charter, was a Mr. John Hewitt, an English Solicitor. The following taken from the Court Books, refers to his admission :

"Friday, the 4th November, 1808.

Court Opened.

The Hon'ble the Recorder.

Mr. John Hewitt, having produced a testimonial of his admission as an Attorney in the Court of King's Bench in Trinity Term 1800,—having practised in India for nearly a year and a half, and having taken the requisite oaths, he is admitted an Attorney of this Court, pursuant to His Majesty's Charter, subject to the Order of the Court."

On the 26th January, 1809, this gentleman was appointed Registrar of the Court, on the recommendation of the Advocate-General of Madras, and the records of the Court further shew, that he had previously acted as Clerk of the Crown in England, and he was practically the first permanently appointed Registrar of the Court. Mr. Hewitt did not however continue long in office, and from his time there appears to have been a regular succession of Registrars until the appointment of Mr. Archibald Duff, as such, by the Government of Bengal [in succession to Mr. William Bengel] on the 28th January, 1814, and who resigned office, and "left the Island" on the 5th August, 1818, being succeeded by Mr. Alexander John Kerr, on the 10th of August, 1818, who held office for

[a.] Mr. Robinson was also "Paymaster of the Hon'ble Co." The post of Accountant-General of the Court was held by the "Paymaster," until the 16th December 1815, when, in consequence of certain irregularities committed by Mr. James Cousens, then styled "Sub-Treasurer and Accountant-General of the Court," the Court passed an Order separating the two offices, Mr. Kenneth Murchison, becoming provisionally Accountant-General, until the appointment on the 8th April, 1816, of Mr. William Sartorius in that capacity. The Court records do not shew when the two appointments were re-united as at present.

1st CHARTER. upwards of 38 years, retiring in June, 1856. Mr. Duff, was the first "Commissioner appointed to take Affidavits and to do such further acts as are required by the Charter," in virtue of a Commission under the Seal of the Court, as at present; the usual oath being administered to him on the 7th March, 1814.* Up to the time of Mr. Hewitt's appointment as Registrar, he had been the only one admitted to practice as an Attorney, by the Court, but on the 15th August, 1809, in consequence of an application having been made for admission, as such, by a Mr. Thomas Kekewich, the Court before granting it, "was desirous of ascertaining what number of Advocates was necessary," and on the 27th of September, 1809, passed the first Order regarding the admission of "Agents generally and specially." By this order, no one was "to be permitted to appear or act as an Advocate, Solicitor, Attorney, Proctor or Agent of the said Court, unless such person had been previously permitted or licensed by the Court to act as Agent, either generally, or specially for the particular occasion.....and any license or permission to act generally, or specially might be vacated or withdrawn at the pleasure of the Court." No provision seems to have been made as to the number of Agents to be admitted, as was apparently at first intended, nor were the individuals thus to be admitted, required to possess any particular qualification. Under this Order, three licenses were granted, but between its date of promulgation, and the 1st August, 1810, the Court had reason to recall one of them, and thereupon passed an order abrogating the previous one, and inhibiting the admission of *General Agents*, and while reciting the absence of professional men, and the practice theretofore of "admitting of unqualified persons," declared, that great irregularities had occurred, and "the Court had judicial knowledge that its former indulgence had been grossly abused," † and provided that excepting "professional men admitted in any of the Courts of Great Britain or Ireland, or licensed by the United Company of Merchants," Special Agents alone would be allowed to appear on behalf of suitors, in certain cases, if approved of by the Court before hand; in all other cases, the Registrar, Clerks and Interpreters, being required to help the suitors, and "if necessary, examine the witnesses in Court." This order remained in force until the 20th August, 1817, when two applications were made by non-professional men, for admission as Agents of the Court, and the above order of 1810, evidently being found impracticable, the Court "ordered that as there were at present no regular Attornies or Solicitors of the Court, to conduct the affairs and business of the Suitors, the prayer of the petitions be granted." This order practically rescinded the order of 1st August, 1810, and the practice thus introduced would appear to have been carried out until the 20th December, 1839, when "Gene-

* Some of the records bear the signature of Mr. Kekewich [Registrar in 1811-1812] as "Registrar and Commissioner," but his appointment by the Court as Commissioner cannot be found, but for many years after the proclamation of the first Charter, Affidavits were sworn before the Recorders.

† See *In the Goods of Thomas Kekewich, deceased*, Ecclesiastical Cases, Vol. II. of these Reports, and *In re Cuthbert Fenwick*, time of Stanley B., *infra*.

mal Agents" were again discontinued by a "resolution" come to by Sir William Norris, and "Special Agents" alone admitted.

1st CHARTER.

STANLEY, E.

1803—1816.

On the 21st January, 1852, by a further Order, all those admitted to practice, subsequent to that date [excepting professional men admitted at home], were required to pass examinations, and were then admitted to act as "General Agents." The admission of "Advocates and Solicitors" of the Court, is now regulated by Order, dated 12th August, 1874, and Ordinances 3 and 5 of 1878. From the very earliest period, the Law Agents of the Court, would appear to have acted in the double capacity of Solicitor and Barrister, and continue so to the present day, without any distinction whatever between the two branches of the profession.

In the early days, the Court seems to have acted with some severity against its officers, for on the 13th February, 1809, there is an entry in the Court Book, of Mr. Thomas McQuoid, the High Sheriff for that year, being fined \$20 "for non-attendance." On the 17th January, 1809, the Court ordered that the different tables of fees be translated in the different native languages, and circulated amongst the heads of the sects of each tribe, "for the use and information of the lower and inferior classes of people, and by beat of Gong." The business of the Court, however, does not seem to have been very heavy, some few cases only being tried at long intervals of each other, and the Recorder sitting alone the greater part of the time.

The first Court of Quarter Sessions, constituted under the Charter, was held on the 11th June, 1808, the Recorder presiding, and one of the Councillors, Mr. W. E. Phillips, sitting with him. The following entry appears in the first Book of that Court.

11th June, 1803.

The Court of Judicature sat at Quarter Sessions, at which the Recorder presided and William Edward Phillips, Esquire, one of the Councillors, sat to enquire of, hear and determine all breaches of the Peace, Quarrels, Controversies, Crimes and Misdemeanors whatsoever, except Treason and Felony, pursuant to His Majesty's Charter of Justice.

As will be seen therefore, the Court of Judicature formed the Court of Quarter Sessions, and whilst sitting in the latter Court, the records shew that the Judges were there styled "Magistrates," the term "Bench of Magistrates" frequently occurring. The cases tried at this Court were very trivial, but nevertheless the Court sat frequently, doubtless due to the paucity of Civil Cases. In 1813, the business of the Court having considerably increased, Sir Edmond Stanley issued an Order, that the Court of Quarter Sessions would only sit four times a year, which was carried out until the second Charter in 1827, the days fixed being 9th January, 29th March, 15th July and 15th October of each year.

The first Court of Assizes or Session of Oyer and Terminer, as it was called, was held on the 5th September, 1808. "The Hon'ble Norman Macalister, Governor, Hon'ble Sir E. Stanley, Knt., Recorder, Henry Shepherd Pearson, William Edward Phillips and John James Erskine, Councillors" being present at the opening of the Session. The first Calendar,—and indeed as it

1st CHARTER. has been ever since in the Settlement of Penang,—shews a very long list of cases, there being no less than 6 for murder, the prisoners on these latter charges being all found guilty, and sentenced to death. At this Session a petition was presented to the Court by a number of prisoners who had been “sentenced by the late Authorities on the Island since the year 1806,” asking “that their cases be considered and the proceedings revised,” or their “sentences varied” in such manner as the Court would deem proper, they engaging, if necessary, to leave the Island not to return again. This petition was granted, in some cases the sentences being remitted, and the prisoners “allowed to leave the Island on the terms offered by them in open Court and agreeably to the prayer of their petition,” and in other instances “under the circumstances of the punishment already inflicted, it being considered for the advantage of the public,” they were “discharged, and the remainder of the sentences remitted, security being given for good and peaceable behaviour.”

According to the Charter, the Grand Jury were allowed to make presentments upon any subject they deemed fit, and as would appear from the records, until a very late period, not unfrequently availed themselves of the privilege; for besides sending up cases for trial, they not only made suggestions, which in many instances were carried out in regard to measures contemplated or passed by the Government, but also visited the different public institutions, roads, &c. On the 2nd May, 1814, the Court, “in consequence of the provisions of Act 53, Geo. III,” passed an Order that four Sessions of Oyer and Terminer, be held annually, fixing the Sessions as follows: 6th March, 6th June, 6th September and 2nd December, any of those days happening to fall on a Sunday, the Session to commence on the day subsequent, which order remained in force till the 2nd Charter. By this same Order, the Court directed “that the Rules of practice of the Court be printed.”

Shortly after his arrival, Sir Edmond Stanley found it necessary to deal with a firm hand with some of the Europeans, who even at this period, seemed to have set at defiance all authority. The first case dealt with against them, was that of Cuthbert Fenwick,* who was arraigned before the Court of Quarter Sessions, on the 22nd December, 1808, for “having challenged Mr. Thomas McQuoid, to fight a duel when in the execution of his duty as High-Sheriff.” For this offence, Mr. Fenwick was fined \$40, and ordered to give security for his future good behaviour for the space of one year.

On the 20th of May, 1809, a proclamation was issued, constituting the Court of Requests, under the Charter, the first Commissioners appointed being Messrs George Caunter, Thomas Raffles, and John Curson Lawrence. Mr. Raffles however, acted as Commissioner of the Court of Requests only till the 17th December, 1810.

* See List of Agents, first Charter.

Appeals from the Court of Requests, seem to have been very frequent at this period,* and the name of Thomas Raffles also frequently appears in the Court Records as plaintiff in his capacity of Secretary to the Government, against individuals for breaches of Farm conventions.

1ST CHARTER.

STANLEY, R.

1808—1816.

The Records shew that a few months after his arrival, a misunderstanding occurred between the Government and the Recorder. The first quarrel that arose, was the refusal by Sir Edmond Stanley to have anything to do with the appointment of Peace Officers—High and Petit Constables, in the different districts, declaring that “this was a matter of local Regulation, and of which, the local Magistracy could best judge of, that he would not interfere either in the nominations of the persons they might wish to make, or in the expenses which they might think necessary to incur and with which he was unacquainted, but that he would merely explain to them the nature of the legal establishment which the Charter had in view and pointed out,—and also the legal duties of High and Petit constables, and the oaths which it would be necessary for them to take, and he was not aware of any power in the Charter given to the Court, to appoint any other Justice of the Peace, *but those that were named in it*”†

Discussions on this and other subjects, continued between the Executive and the Recorder, to a greater or lesser extent, but as these dissensions continued under a train of Recorders, it is not here proposed to go into them in detail.

Up to this date, the Court had been sitting in the “Government House”‡ and on the 16th October, 1809, removed “to the late house of Mr. Dickens,” as the Court-House [*the present one in Penang*] was not “ready for the reception of the Court, notwithstanding the letter written by the Secretary to the Registrar, dated 31st August, 1809.”§

In consequence of a Civil Writ having been issued against

* See further on this subject, time of *Sir John Claridge, R., infra*.

† i.e. the Judges of the Court of Judicature—see first Charter, p. 15.

‡ In “*Fort-Cornwallis*,” [as gathered from the records.]

§ The Court must have removed to its present building in Penang shortly after this date. On record is to be found, a receipt signed “John Hewitt, Registrar,” and dated 7th March 1810, for different articles,—furniture, &c., “for the use of the Court of Judicature, and offices attached, ordered to be supplied by order of the Hon’ble the Governor and Council.” Some of the papers on record would also go to shew, that in Penang, the Recorders, up to Sir John Claridge, “resided in chambers adjoining the Court.”

In reference to the Penang Court-House, the following also appears in the records: “It appearing by letter dated 27th November, 1815, and 2nd December, 1815, that it is wished by Government that the Court-House should be tiled and repaired, the Term being over. the Recorder being uninformed how long such work might take, the Recorder is willing to sit in the Hall of the Registrar’s Office, until the work is finished.” *Recorder’s Note*, 29th February, 1816. In connection with this matter, it may here be stated, that the Court-House was in charge of a *Military Guard* from the time it first opened, until the 28th March, 1825, when the same was withdrawn, and replaced by 1 Jemadar, 2 Sontabardars and 5 Peons, *borne on the Registrar’s Establishment*. Shortly after this, further changes took place, a “Sepoy Guard” being put in charge of the Court, until withdrawn on the 21st May, 1842, owing to a “reduction in the garrison of the island,” and replaced by 4 Chokedars, now reduced to 2 policemen. [On this subject, see further—time of *Sir Benson Maxwell*, as Recorder.]

1ST CHAPTER. one Montgomery, a "State prisoner," the Governor, Colonel
 STANLEY R. Macalister, on the 17th November, 1809, sent for the Registrar,
 1808—1816. Mr. Hewitt, and after having made enquiries as to the arrest of
 the man, and commented upon the use and custody of the Seal of
 the Court,—a matter, as will be seen hereafter, forming the
 subject of further discussion between the Government and one of
 the Recorders in 1858, *—gave certain directions to the Registrar
 "as to the mode of issuing Civil Writs." Mr. Hewitt thereupon
 communicated with the Recorder regarding the order given him,
 being "at a loss to know how and in what manner to issue Civil
 Writs in future." At the opening of the Court next morning,
 Mr. Hewitt read the following affidavit which he had previously
 sworn to, relative to what had passed between him and the
 Governor:

"I received a chit from Colonel Macalister, requesting my attendance on him for a short time. I accordingly immediately waited on him, and was asked by him, if any one and who applied to me for a writ against Mr. Montgomery. I told him, Mr. Hutton did. He then asked me if I knew that Mr. Montgomery was a State Prisoner. I told him, I did not, and could make oath of it. He then said, it was a most impertinent step for Mr. Hutton to take, that he [the Governor] had *that confidence in me*, as to give me the Seal, and that if I would look into the Charter, he [the Governor] ought to have the custody of it. I then told him, I would mention it to the Recorder. The Governor said, Why mention it to the Recorder? and requested me for the future, that the seal be not put to any writ in his name, without I made enquiry into the situation of the person against whom the writ issued. The Governor also asked me, if Mr. Hutton had made an affidavit of the debt, and requested me to ascertain it. I told him I had no doubt of it; and that a petition had been filed, and the usual order of the Recorder had been made for the issuing of the Writ.

JOHN HEWITT,

Registrar.

Sworn before me, this
 18th of November, 1809, in Court,
 E. STANLEY.

N. B.—The Honorable the Governor never gave me the Seal, the same has always been in the custody of the Court.

JOHN HEWITT,

Registrar.

Sworn before me, this
 18th of November, 1809, in Court,
 E. STANLEY.

The Recorder immediately upon this, passed an Order that the Registrar was to issue writs "where writs ought to issue, and to seal the same as required by the Charter and by Law, and that if any question should afterwards arise, relative to the execution thereof, or in what cases a party in custody for a criminal offence ought to be charged or detained in a civil suit, that application be made to the Court, and if the Court be not sitting, to the Judge at his Chambers, where the matter would be disposed of according to law."

* See time of Sir Benson Maxwell, R., *infra*.

This subject was again discussed in Court on the 20th November, 1809, when the Governor declared that “the proceedings in the Court on Saturday last were reported to him to have been of such a nature as to demand from him as its President, some investigation. He deemed such a measure, not only expedient, but absolutely necessary to the good government of the Settlement.” Duly recorded are the minutes of the enquiry made in the matter, at the close of which “the Hon’ble the Governor expressed himself satisfied and also declared in open Court, in the presence of the Grand Jury, that the arrest of the said John Montgomery as a State Prisoner, was a secret measure adopted by himself of his own sole authority as Governor, and that the same was not known to his Council or to any other person.”

1st CHARTER.

STANLEY R.

1808—1816.

The Court, on the 22nd May, 1810, read “the affidavit of John Hewitt, the Registrar and Clerk of the Crown relative to a contempt committed by Cuthbert Fenwick* in composing and publishing under color of a petition for certain native prisoners, a false, contemptuous and scandalous libel, reflecting upon the administration of Justice and the public conduct of the Grand Jury and Magistrates, which was produced by him and read in Court on the 14th May,” and at the request of Mr. Hewitt “granted an attachment against him and ordered him to be committed to Gaol for his said contempt, for one month.”

On the 26th May, Mr. Fenwick petitioned the Court praying to be released, and on the 29th May, 1810, “upon reading the petition of Cuthbert Fenwick, expressing his contrition and sorrow for his offence, his ill-health and the crowded state of the Gaol §, and praying to be liberated, which petition was verified by affidavit, it was ordered by the Court that the remainder of the imprisonment be, under the circumstances, taken off and remitted, and that the prisoner be accordingly discharged from the attachment and relieved from further confinement.”

On the 10th July, 1810, the Court became the seat of very great disorder. Whilst sitting alone in Quarter Sessions on that day, the Recorder was suddenly interrupted by the High-Constables of the Island, who wished to resign their posts. The fol-

* *Vide* List of agents, &c., 1st Charter.

§ The following will shew the state and condition of the Gaol at the time in question:

SESSION OF OYER AND TERMINER.

9th October, 1809.

“..... The Gaoler, William Russell, being called by the Court, and sworn as to the state of the Gaol, and the prisoners in his custody, deposed, that one hundred and forty-seven prisoners were mustered this morning in the Common Gaol that among the prisoners are several who have lain in the said Gaol for upwards of thirteen years, thirteen in all— eleven men and two women †, under charges of murder . . . that one hundred persons, according to his belief, is the utmost that the Gaol can safely contain, and one hundred and thirty-five persons is the average number mustered every day. That the Gaol itself is confined, and low and shut out from air, and contains very little space for the prisoners to move or stir about . . . and although the Gaol is quite crowded, yet the prisoners keep their health tolerably well at present.”

† See foot-note *ante* p. 34.

1ST CHAPTER. lowing extracts from the Court records, will however, speak for themselves. The case is here given at some length, in order to give a more lucid view of the circumstances that gave rise to it, as well as to shew the attitude of the better class of Europeans even at this date.

STANLEY, R.

1908—1916.

"While the Court was proceeding with the trials of the different Criminal Cases, which were set down for this day, Mr. John Dunbar, who appeared in Court with some other persons frequently attempted to interrupt the proceedings by addressing some words to the Court, during the trials, which the Court endeavoured to avoid; he at length pressed himself upon the Court, by informing the Recorder on the Bench, "that he was determined not to act any longer as a High-Constable in the Districts of Glugore and James Town [Byan Lepas,] to which he had been appointed, having served for one year, and that he had communicated such his intentions to the Governor and Council," in which declaration he was joined by Mr. Thomas McGee, Mr. Jeremiah McCarthy, and also Mr. David Brown, the Sheriff, who are also High-Constables The Recorder observed "that as the appointment of Constables was a local matter, *he had left it entirely with the Governor and Council* * as the local magistrates who had nominated those persons at the Quarter Sessions pursuant to their own wishes, and voluntary offers and that he must *decline intermeddling in it*" * upon which Mr. John Dunbar, [joined by Mr. Jeremiah McCarthy, Mr. Thomas McGee, and Mr. David Brown] in a very menacing and contemptuous manner, lifting up his hands, and sometimes laughing in the face of the Court, persevered in stating, "that he and the others were determined not to act, and that they would not act, the Court might fine them, —that they did not mind, nor would they continue to act any longer as High Constables, and further that they could not be compelled to do so without their consent."

"Whereupon the Recorder expressed his surprise at this unexpected conduct of the party, and that no communication had been previously made with him, and he mentioned that if any person were appointed by the local Justices of the Peace at Sessions as High-Constables, under the local circumstances of the Island, and the difficulty of procuring fit European inhabitants in the remote Districts for that purpose, that they were strictly compellable by the Charter to act in those offices . . ."

"Mr. John Dunbar then, in a very insulting tone, declared in the face of the Court, that he would tell the reason why he and the others refused to act, namely—that suits and actions were brought in this Court against him and others [here he observed, and animadverted upon the case of a native against Mr. John Deans for an assault by beating and kicking him, so that he was obliged to continue in the Hospital for several days under surgical assistance, and which had this day been tried in Court]. and that while this Court is conducted as it is, and matters allowed to go on as they are, it was dangerous and a disgrace to continue any longer as High-Constable under this Court; and that the native Petit or Police Constables would or ought also to resign their offices."

"Upon being asked by the Court, what he meant by such expressions, he explained himself by saying that Perjury and subornation of Perjury and false evidences were adduced in this Court, and that for his part, as he received no salary from the Government [observing very flippantly and jocularly that the Recorder received a salary of 1,000 Spanish Dollars a month] he made up his mind, and would not submit—But he denied that it was the law of England to appoint and compel Constables to act against their own will, and threatened in a very haughty tone of voice, that he would appeal the question," and threw out insinuations and reflections equally bold and contemptuous."

"Mr. Jeremiah McCarthy then rose up and in a contemptuous manner and tone, said "that as for him, he was not afraid of the Law," beating his hands on the rail of the Court. Mr. David Brown, the High-Sheriff, instead of maintaining order and decorum in the Court, which he was commanded to do by the Recorder, [the Court now appearing to have become turbulent, and in a state of riot and disorder, crowded by a vast concourse of the Native inhabitants], left his chair, warmly joined Messrs Dunbar, McGee and McCarthy, and in a highly disrespectful and insulting manner, told the Recorder, holding up his hands very contemptuously towards the Court, "that he also would not act, and that he would appeal from any fine or decision, the Recorder may make, and that such was not the law."

"The Recorder commanded the Sheriff to keep order and respect in the Court, and to sit down in his place as Sheriff, which he declined, and would not do, in-

* See ante p. 45.

ising "that he had a right to be heard and would be heard." The Civil Power **1ST CHARTER.**
 having altogether deserted the Court, and it appearing to the Recorder, that it was
 a premeditated attack upon the Court, and that the application in respect to Con-
 stables was only made use of as a color and pretence, and at all events unnecessarily
 forced on the Court, for decision, while the matter was under the consideration of
 the Hon'ble the Governor and Council; and the conduct of the parties, and the
 circumstances which occurred, furnishing a fair presumption, that their real object,
 was to insult the Recorder and the Court, and to degrade it in the eyes of the
 native subjects and others; and in fact, to intimidate the Recorder by parties and
 by threats, in the face of the Court, from doing his public duty, and administering
 the law to the natives in some actions which had depended, and were depending, or
 which may hereafter arise against the individuals who composed their party, and
 others their friends, and also to endeavour to embarrass the Court, and the adminis-
 tration of Justice, under color of declining to act as High-Constables in the
 remote districts, where there was a scarcity of European inhabitants, and where
 they had always the effective aid of the native Police Constables, who were paid
 salaries for doing the actual duty, which rendered the duty of the European High
 Constables [to whom it was only intended to give a kind of controul over the
 native Constables, and to prevent any abuse of power by them] little more than
 nominal; and the Court being reduced to a complete state of disorder and confusion
 [a similar instance of which had scarcely before accrued], and the proceedings of
 the Court being thus disturbed, the Recorder thought it prudent under those
 circumstances, to adjourn the Court to Tuesday the 31st instant, and to decline at
 that moment taking any final determination, upon a matter which came by
 surprise upon him, and in so contemptuous and suspicious a form."

STANLEY, R.

1803—1816.

Immediately after this, the Recorder informed the Governor, of what had happened in Court, and after having asked for a copy of the proceedings, the Governor, Mr. C. A. Bruce, by letter dated 16th July, 1810, informed the Recorder that "the dignity of the Court would at all times command the consideration of Government, and that it was his intention and the intention of such of the members of Government, as could be present, to appear as Judges on the Bench on Tuesday, when he requested that the late High-Constables may be directed to attend. In the punishments legally due to the high offences recorded on the proceedings, the Court would be directed by the legal wisdom of the Recorder. In the enforcement of these punishments, and on the repression and punishment of any of the smallest disrespect to the Court, all the power of Government would be exerted that the nature or necessity of the case may require." On the 17th July 1810, the Court accordingly met by special appointment, and composed of the "Hon'ble Charles Andrew Bruce, Governor, Sir Edmond Stanley, Recorder, and William Edward Phillips, Esquire," "sat as a Court of King's Bench," for the purpose of enquiring into the disorder mentioned, when all the parties were attached, with the exception of Mr. Thomas McGee, "the circumstance of his being with the party in Court, being only alleged against him."

The following shews the sentences passed :

"..... The Court having taken into consideration all the circumstances of the case, and the public declarations made by the respective parties, charged with the high contempts against the Court and the Laws, and their offering to make atonement for their offences, by public apologies; and, considering that in this Settlement, which has existed so long without Laws to repress irregularities, that upon the establishment of a new jurisdiction, and Court of Justice, it is possible that the parties charged may not have exactly known the nature, extent or dangerous consequences of such offences, are disposed on this occasion, to adopt the

1ST CHAPTER. most lenient punishment, that the necessity of supporting the dignity of the Court, and authority of the Laws will admit of, in hopes that their moderation upon the present occasion may produce the desired effect, and prevent the repetition of such outrages in future, and that the Court may not be driven to the necessity of exercising the extensive power with which the law has armed it, for the preservation of due and equal administration of Justice, and the security of peace and good order.

“Under such circumstances, the Court proceeded to pronounce the following sentences upon the said John Dunbar, David Brown, and Jeremiah McCarthy, to wit:

“That the said John Dunbar do pay a fine of 300 Spanish dollars to the Government, to be paid by him or levied in the usual way by the Sheriff,—that he do stand at the Bar of this Court, and read a paper containing a public apology for his contemptuous, disrespectful, and contumelious conduct in Court, on the 10th July, 1810, to be afterwards filed and entered upon the public records of this Court; and that he do afterwards enter into a recognizance with two sufficient securities for his good and peaceable behaviour for the term of 3 years, himself in 500 Spanish dollars, and 2 sureties in 250 Spanish dollars each, and upon the terms thereof that he be discharged.”

The order against Mr. Jeremiah McCarthy and Mr. David Brown, begins by saying, that as they had both “expressed their contrition, and having publicly declared that they did not understand the nature of the offence they had committed,”—or the latter “the extent of his duties, through ignorance,”—and were sorry for it, the Court fined them 20 and 200 Spanish dollars respectively, and that they also do “read a paper containing a public apology in Court.”

The following was the paper read by Mr. Dunbar :

“Whereas I, John Dunbar, late High-Constable in this Island, did on the 10th day of July, 1810, while the Court was sitting, and in the face of the said Court, when the Hon’ble Sir Edmond Stanley, Knight, Recorder, presided there on the Bench, address myself to his Lordship in a very contemptuous, disrespectful and intemperate manner, reflecting upon the administration of Justice, and the proceedings of this Court, and whereas, I confess and do acknowledge that I have acted in a very gross and improper manner; and I did then use gestures and language highly unbecoming and unjustifiable towards the Hon’ble the Recorder before the Court then sitting, which conduct, I must acknowledge to be subversive of the Peace of this Settlement, disrespectful to the office of the Hon’ble the Recorder, to our most gracious Sovereign, and to this Hon’ble Court; and also subversive of the Rules which obtain wherever civilized society is known, I do acknowledge that I was actuated by improper heat and passion on that occasion; and that I regret and humbly ask pardon of his Lordship and of the Court for the indignity offered both to him and the Court: and I offer this public atonement in justice to the injury done the public peace in having insulted the authorities established for its preservation. *Signed.* John Dunbar.” [a]

The order of the Court, after setting out the several apologies, concludes as follows :

“The Court, in consideration of the said public atonement to the Laws, and the authority of this Court, and for the reasons hereinbefore mentioned, are induced to comply with the prayer of the several parties contained in their respective apologies, to remit any additional punishment which the Laws might warrant in such a case, and therefore do discharge them in this instance, And the Court declared, that having observed a disposition of late, in many instances, to shew a contempt of the Laws, and to prevent the free and equal administration of Justice, that they are resolved in future, [after the Law has been so fully and publicly explained] to punish such offences by whomsoever committed, with the utmost severity of the Law.”

[a.] The papers read by the other parties, differ, but slightly from the one given, and relate to the acts committed by each individual.

Between this period, and 1814, the records disclose nothing special, beyond local dissensions between the Recorder and some of the European inhabitants,—one letter signed by two individuals, Merchants of Penang, dated 20th June, 1811, and “which was delivered to the Recorder by his peon, on Thursday, the 20th June, about 4 o’clock, immediately upon his rising from the bench and just as he got inside the door of his chamber,” was communicated by him to the Lay Judges at the rising of the Court at a Session of Oyer and Terminer, on the 22nd June, 1811. This letter informed Sir Edmond Stanley, in consequence of “insinuations thrown out by him, both from the bench and in private,” in regard to the conduct of the individuals in question in the case of *John Baird v. Baretto*,* that “had any imputation of an injurious nature and reflecting upon them been thrown out by private persons, the means of obtaining redress were too obvious to be mentioned, but the dignified position, he, the Recorder, filled in the Island, only admitted of their expressing their surprise that such observations should have been made by a Judge, particularly from the Bench. . . .” Duly registered is the Recorder’s opinion that he believed “it was in consequence of those circumstances, [i.e., the action taken by him in the case above alluded to] that he received the above-mentioned letter, which, he considered a threat held out to him, and if not, a challenge or an endeavour to provoke a challenge, at least it contained a written and a very heavy censure upon him for doing nothing more than his public duty. . . .and that it was difficult to hope that the Recorder would be able to persevere in dispensing justice equally and effectually in a place where so many repeated attacks had been made on the Court from different quarters. . . .and where he was liable to such attacks on his rising from the bench at a very late hour, and after going through the fatigues and labours of very arduous public duties. After stating those circumstances, the Session adjourned. . . .” On the 10th of August, 1812, a few days after the Recorder had received a letter containing “scandalous and malicious libel” in reference to a case[a]

1st CHAPTER.
STANLEY, R.
1808—1816.

*Not reported.

[a.] “IN THE COURT OF JUDICATURE OF PRINCE OF WALES’ ISLAND.

MONDAY, 27TH JULY, 1812.

In the Cause of Inche Meyden and others, Creditors of James Scott, deceased,
against

William Scott, Executor and Trustee of the said James Scott, &c.

.
Read the Order of the 2nd July, 1811, and the Sheriff’s return and the Reports of the Acting Registrar, of 31st August 1811, relative to the debts of the late James Scott, and the inventories filed by William, Robert, and Christiana Scott, and the orders of the 24th and 25th February, 1812, whereby it was ordered that the demurrers put in by the several securities were overruled, and that the bonds passed, should remain as a security against the several Administrators, should it appear hereafter that any Wastes or Devastavits have been committed the Registrar having reported that the parties have not since filed any further account and upon reading the affidavit of Anthony Dragon, dated 17th July, 1812, of the hand-writing of Robert Scott, in two letters, addressed to Sir Edmond Stanley, marked A. and B.,

1ST CHAPTER. pending before him, he caused the following documents to be regis-

STANLEY, R. which letter A., among other things, contains the following :
1803—1816.

SAMARANG,
May, 28th, 1812.

TO SIR EDMOND STANLEY, KT.
Prince of Wales' Island.

SIR,

1st. From your general conduct, I was not surprised at hearing from my friends at Penang, that you had expressed yourself in the following manner, from the bench, viz. : that your mind was tainted with suspicions regarding my conduct that you could never get rid of; that I was a young man, that you had seen once or twice at your house, and whom you had scarcely any knowledge of, but from the splendid equipage and style I had lived in, without any visible income, you had no doubt, but that I had helped myself largely from the rents and profits of the Estate. I will not now say anything against your character, as your words have proved you to the world, a man of no veracity. How you could assert such a falsehood in the presence of gentlemen, who knew that I was very often at your house but by invitation, and that you must have known something about me during two or three years acquaintance, is astonishing. You must be a very shallow observer indeed, that after meeting me for the above period, twice or thrice a week, you could not know something of me. For my own part, I very well studied your character, and am sorry to say, I have not been mistaken.

2nd. Few people indeed, ever sought your company, and I can assure you, I never did, nor had the title of Sir Edmond Stanley, Kt., any weight in my wishing to have the Hon'ble Recorder, as my acquaintance.

3rd. With respect to your violent attack upon my character, you must account to me hereafter, for I hope that period is not far distant, when I trust to meet you as a man publicly, and not as an assassin stabbing at my character, when you knew I could not defend myself. I was two years in Penang, after giving up the administration of Mr. Scott's Estate, why did you not then make the attack you have since done. Holding your conduct in the utmost contempt,

I remain, Sir,
Your most obedient servant,
ROBERT SCOTT.

It is ordered that an attachment do issue against the said R. Scott, for his violent and daring contempt in composing and sending that letter, and it is reserved for further consideration whether the proper officer of the Court should not file a criminal information for the scandalous and malicious libel hereinbefore stated, and whether a Civil action to recover damages for the defamation and slander contained in the said letter should not be brought : "The means I had of keeping up splendid equipage and style are best known to myself, and I think you demean yourself very much in mentioning it, but perhaps, comparing the style you lived in yourself from that of others, you thought a young man keeping a buggy with two horses, the high-road to ruin and indicative of fraud.

Petition of Thomas Kekewich, Acting Registrar and Clerk of the Crown, praying leave to file a Criminal Information against Robert Scott "for the gross, scandalous and malicious libel contained in the above recited letter, on the Hon'ble the Recorder of this Court, and that a Writ of Proclamation may be directed to the Sheriff, commanding the said Robert Scott to appear and answer the contempt committed by him, —the Sheriff having returned the attachment that issued for that purpose, that the said Robert Scott was not to be found in his Bailiwick," filed, August 12.

Attachment against Robert Scott, dated 30th July, 1812, returned 1st August, 1812, read.

Vide Letter of Apology of Robert Scott, dated 26th October, 1812, received 21st May, 1813.

Friday, 23rd April 1813.

"The Recorder feels it proper to reserve to himself the right of proceeding in future against such persons as may have been concerned in the late Criminal proceedings in the unjust libel against the Court and himself, by such modes and remedies as he may be advised to take, and as the honor of the Court and vindication of his own reputation may require."—see *In the goods of Thomas Kekewich, deceased*. Ecclesiastical Cases, Vol. II. of those Reports. /

tered in the Court-Book :

Extract from the General Letter of the Hon'ble the Court of Directors, to Prince of Wales' Island, under date 4th January, 1811.

1st CHAPTER.

STANLEY, R.

1806—1816.

"Para 10. We cannot conclude this subject, without expressing our acknowledgments to Sir Edmond Stanley, not only for the manner in which he appears most assiduously to perform the duties incumbent upon him, as Recorder in Court, but for the readiness with which he has assisted in forming the Establishment of the Police, and Court of Requests, and the attention he has shewn to economy in everything which has come under his consideration."

Extract from the General Letter of the Hon'ble the Court of Directors, dated East India House, London, 4th April, 1807, to Prince of Wales' Island.

"Sir Edmond Stanley, who heretofore held the high office of His Majesty's Prime Serjeant at law in Ireland, is appointed to be first Recorder of Prince of Wales' Island.

His Majesty's anxiety that the Court should have every assistance which legal abilities can render it, is manifested by the selection of a lawyer, who held so distinguished a rank as Sir Edmond Stanley in his Service in Ireland, to fill the office of Recorder, and we direct every attention due to his high station and personal merits shall be paid to him."

On the 21st July, 1814, the Court granted the first "license to marry." These licenses were granted out of the Ecclesiastical side of the Court, on presentation of a memorial, and were presumably granted by the Recorder in his capacity of Ordinary. Each Order of Court, granting such licenses, was duly registered. The first of these, runs as follows :

"Petition of James Cousens, Esquire, for license to marry Eliza Hall, daughter of John Hall, Esquire, and of the said John Hall, read,—

Ordered the prayer of the said petition be complied, and that a license do issue to Wm. Edward Phillips, authorizing him to celebrate the said marriage pursuant to law."

The practice however, was generally resorted to, "in the absence of the Chaplain from the Settlement, or of any authorized clergyman of the Church of England." The last license granted by the Court, in Penang, bears date 15th June, 1855. By an Order of Court, dated 5th August, 1829, the fee for "filing petition for marriage license," was fixed at \$2, and for a "license for celebrating marriage under Seal of the Court," at \$20.

Appeals from decisions of the Court of Judicature, were made under the provisions of the Charter, to the King in Council [Privy Council]. The first one on record from the opening of the Court, is on the Civil Side, and is that of *Cundapha Shatteer v. John Dunbar*, dated 5th May, 1814, wherein judgment was entered up for the plaintiff for \$10,478.60½, and appeal granted "on condition of the defendant depositing the amount of judgment in the Treasury, and furnishing security by Bond to the plaintiff for \$2,000 for costs of appeal."

On the 20th January, 1816, a difference arose in Court between the Recorder and the lay Judges on the propriety of proceeding with the trial of Mr. James Cousens, the sub-Treasurer and Accountant-General of the Court, who was charged *inter alia* with embezzling suitors' monies. "Mr. Duff, the Law Officer of the

1ST CHARTER. Honorable Company," eventually filed a *Nolle Prosequi* against Mr. Cousens, and he was discharged from custody. As before stated, on the discovery of the irregularities, the post of Accountant-General was separated entirely from the Treasury.*

STANLEY, R.

1808—1816.

The records do not shew anything of further consequence in Sir Edmond Stanley's time [a.]. Shortly before his departure, he recorded the following :

14th November, 1816.

The Recorder thinks it proper to record in the Court Books that Mr. Robert Ibbetson, the High-Sheriff of Prince of Wales' Island, and the Paymaster of Government, has never, since his appointment to the office of High-Sheriff, honored his Majesty's Court with his presence, either on the first days of the opening of the Terms or the Sittings after or on any day during the Terms or Sittings, since his appointment, nor has he ever been present on any occasion at any part of the proceedings of the Court, nor has the Recorder of Prince of Wales' Island ever seen him in Court or elsewhere since his appointment to the office of High-Sheriff."

COOPER, R.

1817.

Sir Edmond Stanley was succeeded by Sir George Andrew Cooper, who remained here but a few months[b.] Beyond a few then important cases tried by him, one of them relating to the dismissal of a petition by "Charles McKinnon, Esquire,† praying that part of the Will and Testament of the Hon'ble William

* ante p. 41.

[a] The following extracts contain an interesting account of the services, &c., of the first Recorder :

"Sir Edmond Stanley was born in November, 1760—became a student of Trinity College, Dublin, in 1776 and was there elected to a scholarship. Called to the Irish bar on the first day of Michaelmas Term 1782, and went the Connaught Circuit—appointed King's Counsel and a Bencher of the Honorable Society of King's Inns in Dublin. In May, 1790, returned to the Irish Parliament for the borough of Augher, in the County of Tyrone, and subsequently for Lanesborough, which place he continued to represent till the legislative union abolished the Hibernian House of Representatives; entered the House of Commons soon after he became a King's Counsel and remained a member of that body for about seven years; dignity of King's third Sergeant conferred on him in five years from the period of obtaining his silk gown. Frequently employed in the trials of offenders during the Irish rebellion of 1798, and specially sent to Cork in that year where he performed duties assigned to him at great personal risk, receiving the thanks of Government, &c., became Prime Sergeant in 1800, and soon after received the additional appointment of Commissioner of public accounts. In April, 1807, appointed Recorder of Prince of Wales' Island, being the first who filled that office under the new Charter of Justice, which had been issued for the purpose of establishing there a Court of British Judicature. On that occasion, he received the honour of Knighthood In 1816 appointed one of the Judges of the Supreme Court at Madras, and eventually Chief-Justice of that Court till the year 1825, when he retired on pension and returned to Europe. In the discharge of his judicial functions at Penang, he had a task of no ordinary difficulty. The state of society to which he was bound to become an instrument of reform, was then marked by almost every crime that can be committed against public order, or against person, habitation or property. But the successor of Sir Edmond gives a very different account of the condition of the Island, and from this the inference is obvious, that during the few years which he presided, his wise and rigorous administration of Justice had been attended with the most salutary results. died at Richmond, Surrey, 28th April, 1843." [London Asiatic Journal, June, 1843.]

[b.] The dates of assumption and relinquishment of duties by the different Recorders, as well as the mutations between them, are not given in this preface, but will be found set out in the list of Recorders and Judges, *infra*.

† Was "Principal Surgeon to the Hon. Co."—[In the Goods of William Petrie, deceased, 23rd July, 1817, not reported.]

Petrie, Esquire, [the late Governor who had died in October, 1816], containing libellous and scandalous expressions against him, the said Charles McKinnon, be ordered to be expunged from the said Will, and that Probate of the said Will be stayed," there is nothing to be found, requiring particular notice.

Sir George Cooper was replaced by Sir Ralph Rice, who arrived here in November, 1817. Shortly after his arrival, he admitted the first Notary Public or Conveyancer to practice. The following entry is to be found in the Court Book, in reference to this appointment:—

1st CHARTER.
COOPER, E.
1817.

RICE, R.
1817—1824.

15th December, 1817.

Petition of Robert Terraneau to be appointed a Notary Public.

Upon reading the entry in the Minute Book of Mr. Thomas Stackhouse, * appointed as a Notary Public, and Burn's Ecclesiastical Law, respecting the appointment of Notaries,

Ordered that Mr. Robert Terraneau * be appointed Notary Public for this Island, and the usual oaths be forthwith administered to him, which was accordingly administered."

By Ordinance 5 of 1873, section 38, Conveyancers were required to pass an examination prior to admission and enrolment, and by the same Ordinance, all unlicensed individuals were prohibited under a penalty from acting as Conveyancers. These admissions are now governed by Ordinance 5 of 1878, section 23.

On the 26th October, 1819, Sir Ralph Rice proceeded to China, on account of ill-health, and returned to Penang on the 23rd February, 1820, his duties in the meantime having been carried on by the Governor, Colonel Bannerman, and Councillors.

The records in Sir Ralph Rice's time, disclose nothing special, beyond embarrassments evinced by the local authorities in regard to the landed tenures of the Island, and regarding which, in the absence of any Crown Law Adviser, he was frequently consulted by the Government. Some of his opinions are to be found embodied in a valuable work by Mr. W. E. Phillips, the then Governor, a manuscript of which, is amongst the records of the Court [a].

On the 12th November, 1821, a matter of an extraordinary, and of a somewhat important nature, occurred in reference to one of the Councillors, Mr. John Macalister, who being also a Judge of the Court, as well as a Magistrate and Justice of the Peace, was called upon to furnish security to keep the peace for having challenged a Major Coombs, [whom, "the statement of the case," signed "W. E. Phillips, Governor, Ralph Rice, Recorder, and "J. J. Erskine, Councillor," styles "Town Major, and a very respectable man"] † to fight a duel. Mr. Macalister furnished security, but not without having first protested on the ground

* Vide List of Law Agents, &c. 1st Charter.

[a.] Since published by the Hon'ble W. E. Maxwell, Comr. of Lands, S. S. [1884].

† Was previously aide-de-camp to Governor Petrie. [In the Goods of William Petrie, deceased, 23rd July, 1817, not reported.]

1st CHARTER. that "he also was a Magistrate and conducted
RICE, R. "himself in an insulting, violent manner" before the other Magis-
1817—1824. trates who were also Justices of the Peace, and before whom he
 had been summoned by letter to attend. The records shew, that
 after entering into a recognizance in \$6,000, to be of good behavi-
 our for two years, Mr. Macalister apologised for his conduct,
 which was accepted as "satisfactory and adequate to the vindi-
 cation of the honor and character of the Magistracy,"
 but the Court left "the Judicial decision and determination of
 the case, to the higher authorities elsewhere, Mr. Maca-
 lister's situation in the Court and Government, wholly exempting
 him from trial for a *misdemeanor* in this Court, according
 to the provisions of the Charter." The matter was thereupon re-
 ferred to the Governor-General of India, to whom Mr. Macalister
 appealed as well, and a "case stated for the East India Com-
 pany." Mr. Macalister was eventually severely censured, and
 duly recorded are to be found the opinions of "J. B.
 Bosanquet, R. Gifford, Attorney-General, J. S. Copley, Solicitor-
 General," dated Lincoln's Inn, 10th February and 20th March,
 1823 respectively, as well as the opinion of the Advocate-General
 of Bengal, who had all been referred to, "that one of the Judges
 of the Court of Prince of Wales' Island, may be arrested and
 imprisoned there by Warrant of the other Judges, for refusing
 "to find securities to keep the peace, upon certain occasions as
 "that mentioned in the case namely, an alleged intention to fight
 "a duel, such a proceeding being necessary not merely to prevent
 "the commission of a misdemeanor, but of a felony in which he
 "would be liable to be tried by the Court."

Sir Ralph Rice inaugurated a system of pleadings, which was
 a wide departure from the English pleadings introduced by Sir
 Edmond Stanley,—these consisted of a simple form which was
 mostly by way of petition. The records disclose in his time, the
 first of the only two libel cases heard in Penang criminally before
 a Jury, a Mr. John Anderson, on the 30th September, 1823, being
 arraigned for libelling a Captain Luke, and sentenced to two
 months' imprisonment and to enter into a recognizance to keep the
 peace. The other case was that of one *Mootoo Oodian*, who was
 tried under the Penal Code in May, 1873. Sir Ralph Rice left
 for Bombay, where he had been appointed a puisne-judge, in
 August, 1824.

BAYLEY, R. Sir Francis Souper Bayley, appointed successor to Sir Ralph
— Rice, assumed duties on the 26th August, 1824, but died within
1824. two months after his arrival.

1825—1826. On the 27th October, 1824, the Governor Mr. Robert Full-
[No RECOR- ton, took the bench with Mr. William Armstrong Clubley, Senior
DER.] Councillor, and ordered "that the office of Recorder having now
 "become vacant by the demise of the Hon'ble Sir Francis Souper
 "Bayley, Knt., Recorder of Prince of Wales' Island and its de-
 "pendencies," and in accordance with the provisions of the Charter,
 the Court do "proceed on business of the Term and perform all
 "its other functions, and moreover adjourn from time to time as

"it shall see fit, as prescribed by the said Charter." This order was carried out for nearly three years, the Governor and Councillors taking the bench in turn, until the assumption of duties by Sir John Thomas Claridge, the first Recorder under the 2nd Charter, in August 1827. Sir John Claridge however, arrived in Penang, a year before the Charter under which he derived his authority, had reached the Straits. In the meantime, as herein-after mentioned, he acted as a sort of assessor to the lay Judges.

1825—1826.

[No RECOR-
DER.]

CHAPTER V.

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SIR EDWARD JOHN GAMBIER.

1835—1836.

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of further discussion—Sir Wm. Norris only Recorder who remained in office a long number of years—his predecessors transferred to India after short tenure of office—presentment of Grand-Jury on the subject to Sir Edward Gambier—Sir Benjamin Malkin advocated the abolition of the system—Straits very little apprenticeship for India—Sir Wm. Norris concurs with his predecessors, Sir John Claridge and Sir Benjamin Malkin, on the subject—Sir Wm. Norris' departure—his services.

SIR CHRISTOPHER RAWLINSON.

1847—1850.

Sir Christopher Rawlinson previously Recorder of Portsmouth—his arrival—During interval between departure of Sir William Norris and arrival of Sir Christopher Rawlinson, Governor appoints Mr. Salmond, Resident Councillor of Malacca, a Lay Judge there—power vested in Governor by Charter—Mr. Salmond proceeds to the Court-House to take the oaths of office—Being ill he remains in his carriage—Mr. Lewis, Accountant-General, requests the Senior Sworn Clerk to have the Court opened and Mr. Salmond afterwards sworn as a Judge of the Court in his carriage—the Clerk objects—Mr. Lewis insists—the oath is administered to Mr. Salmond in his carriage, the Clerk previously objecting to the course adopted—the Clerk reports the matter to the Registrar—the latter communicates with the Governor—result—power of authorizing Resident Councillors in each Settlement to sit in absence of Recorder—Charter—each authority forwarded to the Registrar and filed—the system inaugurated by Sir Benjamin Malkin—doubts at one time raised as to the legality of holding a Court at any one of the Settlements without presence of Recorder—doubts overruled by Sir Benjamin Malkin—extract from his letter on the subject—assumption of duties by Sir Christopher Rawlinson—Punghulus—native headmen—Malay custom—Indian enactments—term not met with in early local Regulations—question raised in Malacca—Punghulus as Constables—case referred to professional Judge—Quarter Sessions—Punghulu oath in Malayan character—copy of translation of oath—question raised not brought before Recorder—Punghulus invested with powers of Police Officer or Constable—Peace Officers—jurisdiction for the relief of Insolvent Debtors conferred on the Court—Statute—Recorder sole Commissioner or Judge—Court Rules, Orders and Tables of Fees—jurisdiction conferred constitutes a quasi distinct branch of the Court of Judicature—Seal—device—inscription—Grand Jury recommend that witnesses be paid for attendance at Criminal Sessions—nothing comes of the recommendation—present allowance to witnesses—Straits Settlements cease to be subordinate to Fort William—placed in direct correspondence with India—Sir Christopher Rawlinson and prison discipline—High-Sheriff nothing to say in the matter—reasons—High-Sheriffship next to useless—should be abolished—Recorder recommends appointment of Inspector of Prisons—reforms afterwards, carried out—before leaving the Straits, he advocates trial by jury in matters of fact—one of the great defects he had found in the Court—no power to call jurymen to aid him in deciding on facts.

SIR WILLIAM JEFFCOTT.

1850-1855.

His arrival—several important cases decided in his time—Rules and Orders of Court—admission of Advocates and Solicitors—Letter from Governor Butterworth to Recorder—bears testimony to kind courtesy which marked Recorder's intercourse with authorities—records disclose nothing deserving special mention—presentments of Grand Jury—frequent occurrence of Sessions—severe tax on Jurymen—those from the Province—death of Sir Wm. Jeffcott—the second Recorder who dies in office since Sir Francis Bayley—at the time of his death, Sir Wm. Jeffcott appointed Recorder of Singapore under third Charter—his services.

In 1825, by Act 6, Geo. IV, c. 85, s. 21, Singapore and Malacca [380 and 260 miles distant from Penang respectively] were annexed to Penang, as one Presidency, and a new Charter dated 27th November, 1826, on the petition of the East India Company, was granted by the Crown, which created the united "Court of

2ND CHARTER.

CLARIDGE, R.

1827—1829.

2ND CHARTER.—Judicature of Prince of Wales' Island, Singapore and Malacca." Before being annexed to Penang, "during the first seven years of its existence, Singapore was a residency administered by a subordinate officer, directly responsible for all his acts to the Supreme Government of India. This officer, with the aid of two assistants and two or three Clerks, discharged the whole Civil duties of the Settlement, *including the administration of Justice*, Police, the Pay Department, Civil and Military*" Malacca was, of course, ruled by Dutch Law before being taken over by the East India Company †

The new Charter was, to a great extent, but a repetition of the previous one, having for its main object, the extension of the jurisdiction of the Court over Singapore and Malacca. ‡ The Governor and Councillors continued to be Judges under it, and the Recorders also, to make Penang their head-quarters. §

The 2nd Charter only reached Penang in August, 1827, although Sir John Thomas Claridge, the first Recorder under it, had arrived in July, 1826. This would appear to have been "owing to negligence in some office at home, during that period, Sir John Claridge offered his services, and they were generally accepted," as before stated, "as a sort of assessor to the Lay Judges of the Court." || On the receipt of the Charter, the usual formalities were gone into of proclaiming the Charter, making Rules and Orders of Court,—Court hours being fixed from 10 a. m. to 3 p.m., settling Tables of Fees, and other matters connected with the working of the Court,—some of which tables of fees, although partly amended since the new constitution of the Court, are still in force at the present day.

On the 18th October, 1827, Commissions of the Peace were issued for the first time, none having been issued under the first Charter, the Judges of the Court thereunder, having been also Justices of the Peace. ¶ The Commissions related to the three Settlements, and the following are those who were first appointed "to act as Justices of the Peace for the three Settlements," the same being "duly recorded : " Messrs. Kenneth Murchison, John Anderson, Thomas Church, William Elphinstone Fullerton, Patrick Ogilvie Carnegie, Charles William Henry Wright, Richard Caunter, Edward Presgrave, John Pattullo, William Thomas Lewis, Samuel George Bonham, Alexander Laurie Johnstone, Christopher

* *Journal of an Embassy to the Courts of Siam and Cochin-China*—Crawford, pp. 556, 7.

† "I will pass by their [the Dutch] Court of Justice, because it hardly deserves the Name, since Strangers are excluded from the Common Laws of Humanity, wherein I am able to give many Instances, but I voluntarily pass by Particularities." *A new account of the East Indies*—[Chapter 38, Quedah and the other Maritime Countries and Islands, as far as Malacca]—Captain Alexander Hamilton, p. 81, London, 1744.

‡ See *Ong Cheng Neo v. Yeap Cheah Neo & ors.*, *infra*, p. 348.

§ *Vide* reasons of Sir Benjamin Malkin for residing in Penang—Ch. VI., proclamation of 3rd Charter.

|| Report of *Indian Law Commissioners*, 1842, p. 114.

¶ See *ante* p. 45 and first Charter, p. 15, Marginal note : "Jurisdiction of the Court defined."

Bidoubt Read, John Argyle Maxwell and Hugh Syme." On the 3rd December, 1827, by letter from "John Anderson, Secretary to the Government," the Registrar was informed, that "it was not considered desirable that the names of Messrs. John Anderson and W. E Fullerton, should be inserted in the new Commission, about to be prepared, *as the public duties of those gentlemen would render their regular attendance as justices impracticable*, and that the following gentlemen had been directed to attend the Court to take the prescribed oaths as Justices of the Peace for Prince of Wales' Island, Singapore and Malacca, *vis.*, Messrs A. M. Bond, R. F. Wingrove, R. J. Cuthbertson and William Anderson," thereby implying that in those days, these appointments were not merely nominal, as they became in many instances in future years.

2ND CHAB-
TBE.
CLARIDGE R.
1827-1828.

From this date, the records shew similar appointments made from time to time, all being duly recorded. Appointments of Justices of the Peace, are now regulated by Ordinance 3 of 1878, s. s. 55, 56 and 59, their powers being defined under Ordinance 20 of 1870.

The Governor, Mr. Robert Fullerton, and the Councillors, sat with the Recorder, but a few days after the Proclamation of the Charter, which took place on the 9th of August, and on the 2nd of October, a minute is recorded that the Governor had enquired from the Registrar "whether at any time the Governor or any member of Council as Judges, assumed any direct interference over the transaction of the business of the Court, the Recorder being present." Having received a reply that there was nothing on record on the point, the Governor and Councillors discontinued to sit with the Recorder. The latter immediately entered a protest against the course adopted by the Governor in not sitting with him, and "refused to take on himself the conduct of the Court business independently of his colleagues," because *1st*, he was not bound by the Charter to conduct the business of the Court, *2nd*, that the Charter directed the Court to consist of the Governor, Recorder and Resident Counsellors at each Station, and spoke of the Court collectively, *3rd*, that he refused to make a precedent to bind any future Recorder, *4th*, that the Government had made no provision for the payment of his Clerk's salary, *5th*, that there was no Court Establishment formed—or to what extent, if formed, aid would be afforded by the East India Company, and *6th*, that when he saw a "full, efficient and respectable Court Establishment of Clerks, Interpreters, &c., formed," he was willing and prepared, if his colleagues desired it, to take on himself the sole conduct of the business of the Court, "in the full belief that it was for the public benefit that he should do so" and that his other colleagues had other duties to attend to.

The Government took no notice of this minute, and neither the Governor, nor any of the other lay Judges again attended the Court. Correspondence followed on this and other subjects, violent minutes being recorded, and no Court Establishment formed. The Recorder, on the 10th October, 1827, recorded his

2ND CHARTER.
 —
 CLARIDGE R.
 —
 1827—1829.

surprise at the Governor not having attended on that day, as he had promised to do, and adjourned the Court to the following day, "proposing at the same time," a meeting of the Judges respecting the Court Establishment, and recording his refusal to conduct the Court business, unless supported by officers in whom he could place confidence. In answer to this minute, which was duly forwarded to the Governor, the latter explained his absence, and excused himself on the plea that he had "mentioned it only as the day on which it might probably be convenient for him to attend, that the Charter required the presence of only one Judge, and that the Recorder was therefore fully competent to propose any list of Establishment he might see fit." From this day a regular schism broke out between the Recorder and the other Judges. The Records abound with the disputes that took place between the Executive and the Court at that time,—displaying great irascibility of temper, and a *very sad state of affairs*,—and certainly worse than had ever happened before or after the grant of the first Charter of Justice. It will easily be conceived however, as before stated, that in this preface, and moreover at this period, the matter being no longer of any moment, it is not desirable, especially in this case, that the particulars in connection with these disputes, should be set out, however much they may have happened under a previous Government,—but suffice it to say that those under notice were all referred to the Board of Directors, eventually ending in the re-call of Sir John Claridge from the office of Recorder.* The charges against him were six in number, and shortly as follows:

- First*, his refusal to execute the duties of his office of Recorder in the manner observed by his predecessors, until the Government guaranteed the payment of salaries to the officers of his Court, upon an increased scale.
- Second*, his refusal to administer the oaths to Mr. Murchison, the Resident Councillor of Singapore, when duly appointed, in order to qualify himself as a Judge of the Court.
- Third*, his refusal to proceed to Singapore and Malacca for the purpose of holding Sessions for the trial of criminals at those Settlements, unless the Government would pay the circuit expenses.
- Fourth*, his exertion of authority, in repealing individually a standing Order of Court, which had been passed by a majority of the Judges.
- Fifth*, his unbecoming conduct towards his colleague, the Resident Councillor of Malacca. †
- Sixth*, his having made use of his judicial station, to hold up the administration of Government with reference to the judicial establishment, to public odium. ‡

* Apart from Court Records, the different matters in connection with Sir John Claridge's recall, will be formed treated at length, in an article that appeared on the subject, supposed to have been written by an official in the "India Office" at home,—in the *February* number of the home "*Asiatic Journal*," for 1832.

† This consisted in an alleged affront to Mr. Garling, the Resident Councillor of Malacca, whilst sitting on the bench as the Recorder's colleague. It would appear that "a man unacquainted with the rules and process of the Court, addressed a petition respecting some rights of fishery" to Mr. Garling, who at once handed it over to the Recorder—the latter addressing the Interpreter of the Court thereupon exclaimed: "Symons, declare openly in Court, that if the people have any points in dispute, they have no business to go to Mr. Garling," which caused the latter to quit the bench and decline sitting with the Recorder again.

‡ Remarks made by the learned Recorder in his charge to the Grand Jury at Singapore, on the 16th February, 1829.

As will be seen hereafter, the third charge constituted the ground for the recall of Sir John Claridge. In a long minute, dated 19th March, 1828, "that his colleagues may be made acquainted with the reasons which induced him to abide by a resolution exposing him to the imputation of want of public spirit and disregard of the best interests of the inhabitants of this Settlement, and that his successors may know the truth, he resolved to place among the minutes of the Court, the reasons which obliged him to remain at Penang during the approaching Circuit . . . , " and after repeating the terms on which office had been conferred on him, declared *inter alia*, the refusal of the local Government to guarantee or pay his Circuit expenses, and also that he would have "sacrificed all pecuniary and personal considerations, and proceeded at once to the other Stations, defraying all expenses from his own pocket," had it not been for "the direct insult offered to the Recorder by the Government, in proposing such a ship as the *Speke* [a sailing ship carrying Sepoys] as a conveyance for him and suite, while the Governor himself was accommodated in the Company's Frigate *Hastings* which was sent to this place for the express purpose of carrying the Governor and Recorder on Circuit." The Governor's refutation of this minute follows shortly after, and as "the Recorder still declined to proceed to Singapore and Malacca," Mr. Fullerton proceeded to the former Settlement, and there on the 22nd May, 1828, with Mr. Kenneth Murchison, Resident Councillor, held the first Court or Session of Oyer and Terminer, since the Proclamation of the Charter, and consequently the first Court of the kind ever assembled in Singapore. At this first Session, 27 Indictments were presented to the Grand-Jury, of which 6 were found for murder, 2 being against the same individual, 1 for manslaughter and the rest for cases of assault and offences against property. In two of the murder cases, the culprits were sentenced to death and executed: the first [and therefore the first since the establishment of the Court], on the 2nd June, 1828. On the occasion of passing sentence of death on the first prisoner, the Court informed him that this "being the first time a Court of Oyer and Terminer had been held at Singapore, the Court would willingly have mitigated the sentence had there been any extenuating circumstances, but that they could see none." At this Session, the Governor in his charge to the Grand-Jury, told them that "two persons accused of piracy must now be discharged for want of Admiralty jurisdiction, a defect already noticed, and which it was expected would in due course be amended." From Singapore, Mr. Fullerton proceeded to Malacca, where he opened the Assizes for the first time in that Settlement on the 16th June, 1828, and after disposing of the Criminal business there, returned to Penang.

On the 13th August, 1828, a difference occurred in Court between the Judges, in the matter of an application by Counsel for a writ of *Habeas Corpus* to bring up the body of one Charles Maitland, on the ground of his illegal detention by the Military Authorities. After reading the affidavits in the matter and hearing Counsel, the Recorder decided that "a *Habeas Corpus* ought to

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TER.

CLARIDGE, R.

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2ND CHAR- issue." * The Governor in a long judgment setting out his reasons, declined to entertain the motion, the other lay Judge Mr. Ibbetson, concurring with him. "The motion was accordingly refused by a majority," the Recorder remarking that "the CLARIDGE, R. 1827-1829. Governor and Mr. Ibbetson appeared to have written their "opinions before they came in, and that Mr. Ibbetson had probably "seen the Governor's opinion before he came into Court, as his "own opinion agreed with it." This note of the Recorder's formed the subject of further discussion. The records shew that Sir John Claridge left for Calcutta on the 13th October, 1828, "for the purpose of laying before the Judges of the Supreme Court, a full and true statement of all that had passed between the Government in Council of this Settlement and himself, and of having an interview with the Governor-General," but shew no results. Sir John Claridge resumed duties on the 22nd December, 1828, on his return from Calcutta.

"Orders having been given for providing a suitable vessel [H. C. Ship *Fifeshire*] for the "accommodation of the Honorable the Recorder and the Court Establishment on the approaching circuit, and every necessary preparation being in progress at the other Stations," Sir John Claridge proceeded on circuit, arriving at Singapore on the 28th January, 1829. After despatching both the Civil and Criminal business there, he called at Malacca and from thence returned to Penang. The records from this period, as before, disclose nothing but fresh discussions between the Executive and the Recorder, the latter immediately on his return, asking the concurrence of the Governor as President of the Court, that the recommendation of the Grand-Jury at Singapore "that the professional Judge should visit that Settlement at least four times a year, and that a steam-vessel be placed at his disposal," be forwarded to the Government of Bengal with as little delay as possible, the Governor in reply stating that "he concurred as far as regarded the request of the Grand Jury to submit to Government, a copy of his, [the Recorder's] charge,"—which charge—the subject of one of the grounds of complaint against him afterwards—† contained animadversions of Sir John Claridge on the fact of his not having been provided with a steam-vessel when he had been given to understand before leaving England that one would be placed at his disposal,—and other allusions generally, in regard to the Court Establishment and expenses. Correspondence of an animated character again followed on this and other matters, all being "ordered to be entered among the minutes of the Court."

Before his recall however, and unaware of same, Sir John Claridge left for Singapore by the H. C. Ship *Kellie Castle*, and arrived at that Settlement on the 4th September, 1829, for the purpose of holding a Session of Oyer and Terminer, and afterwards

* Case not reported, but regarding interference, &c., of Lay Judges, see time of *Norris*, E.

† See Charge *sixth*, ante p. lxiv.

proceeding to Malacca, for a similar purpose, when the Governor, who had left Penang for Singapore the day after the Recorder, arriving at the latter Settlement on the 5th, at once forwarded to Sir John Claridge "copy of a letter now received from the Right Honorable Sir George Murray, one of His Majesty's Principal Secretaries of State, transmitting an Order of His Majesty in Council, signifying the pleasure of His Majesty [to Sir John Claridge] for his repairing forthwith to England in order that the subject matter of a memorial and petition of the Court of Directors of the East India Company, complaining of the conduct of Sir John Claridge, Recorder of Prince of Wales' Island, &c., may be fully investigated," which letter reached the Governor, shortly before his departure from Penang.

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CLARIDGE, R.
1827-1829.

On receipt of this letter, the Recorder informed Mr. Fullerton that since his arrival in Singapore, he had "discovered that the arrears of business both Civil and Criminal were unusually heavy and important," and proposed to continue the execution of his functions till the 1st November provided Government furnished him with a ship to carry him to "North Island" [?] to await the arrival of H. C. Ship *Lady Melville*, and thus enable him to dispose of all cases pending both at Malacca and Singapore. The Governor, by letter dated 5th September and headed "H. C. Yacht *Nereide*, Singapore Roads," replied that his [Sir John Claridge's] recall necessarily involved an immediate suspension of his functions, and he was therefore compelled to decline his acquiescence in the proposition which his letter conveyed. This led to further strong correspondence, the Registrar being eventually requested to place same, both by the Governor and Recorder, on the records of the Court.

Sir John Claridge however, did not proceed home forthwith, as directed, but left Singapore on the 9th September for India—for what purpose the records do not shew,—leaving Calcutta on the 4th July, 1830, for England. On his arrival, he was examined upon the different charges brought against him, being represented also by Counsel, the result as before stated, ending in his recall. The following Order in Council shews that some of the charges were totally discarded, no reference being even made to them:

"December 15, 1831.

"The Lords of the Committee * to whom the petition of the Court of Directors of the East India Company, complaining of the conduct of Sir John Thomas Claridge, Recorder of Prince of Wales' Island, and praying his removal from office, was referred by your Majesty, having since his return to England, resumed the consideration thereof, and having also duly considered the representation made by Sir J. T. Claridge himself, and heard counsel † in support of the allegations con-

* "The Lord Chancellor, The Lord President, The Lord Chief Justice of England, The Lord Chief Justice of the Court of Common Pleas, The President of the Board of Control for the Affairs of India, The Earl of Carlisle, The Duke of Richmond, Mr. Wynn.—"

† Mr. Sergeant Spankie on the part of the East India Co., and Dr. Lushington for Sir J. T. Claridge.

2ND CHAM-
TER.
CLARIDGE, R.
1827—1829.

tained in the respective petitions, have agreed to report to your Majesty their humble opinion—that, although Sir J. T. Claridge cannot be justified in the measures to which he had recourse, either for the purpose of enforcing the allowance by the Governor of those charges and expenses which the said Sir J. T. Claridge thought necessary for the establishment of his Court on a proper footing, or for enforcing payment of the expenses of his circuit, which he, the said Sir J. T. Claridge, had reason to expect to have received, yet their Lordships are inclined to think the local Government not wholly justified in refusing to allow what the former Recorder and Sir J. T. Claridge thought a just and necessary measure of expenditure with respect to the Courts of Justice; and that a delay, much to be regretted, occurred on the part of the East India Company, either to authorize the payment of the circuit expenses, or to bring that question to an early decision. Their Lordships are of opinion, that this case may be attributed principally to such refusal and delay; and that under these circumstances, the conduct of Sir J. T. Claridge proceeded from a mistaken view of the line of his duty, and not from any corrupt or improper motive. Whilst, therefore, the irritation which has taken place between the local Government and the Recorder, prevents the Lords of the Council from recommending to your Majesty to continue Sir J. T. Claridge in the exercise of that office, it appears to their Lordships that no imputation rests on the capacity or integrity of Sir J. T. Claridge in the exercise of his Judicial functions, so as to preclude your Majesty from employing him in your service in some other judicial situation. And their Lordships are further of opinion that the Right Hon. Viscount Goderich, one of your Majesty's Principal Secretaries of State, should receive your Majesty's pleasure for signifying to Sir J. T. Claridge his removal from his seat as Recorder of Prince of Wales' Island.

“His Majesty, having taken the said report into consideration, was pleased, by and with the advice of his Privy Council, to approve thereof, and to order, as it is hereby ordered, that Viscount Goderich, one of his Majesty's Principal Secretaries of State,—do receive His Majesty's pleasure, touching the removal of Sir John Thomas Claridge from his office of Recorder of Prince of Wales' Island.

“C. GREVILLE.” *

Whilst dissensions were going on between the Recorder and the Governor, the latter Mr. Fullerton, on the 1st February, 1829, recommended to the Board of Directors, the entire abolition of the Court of Judicature [a], that the administration of Justice be entrusted to certain officials, and that “..... if the administration of Justice entirely by civil public servants be objected to, there could be no difficulty in attaching five merchants, settlers, as assessors, on the same principle as a Mayor's Court, the Resident as Mayor, the others as Aldermen, and the Governor and Council holding only, as formerly at Madras and Bombay, the Courts of Oyer and Terminer. *Any one of the modes here proposed would be preferable to the present, which is more expensive and worse adapted than any system which could be devised [b].*”

[COURT SUS-
PENDED.]
1830—1832.

After the departure of Sir John Claridge, the Resident Coun-

* Clerk of the Council.

[a.] As a contrast to this, Sir Benjamin Malkin, Recorder, in a letter to Governor Murchison, dated 7th July, 1835, questioned the necessity for a Governor here at all, and remarked that “in the present administration of these Settlements, everything being finally referred to Calcutta, and decided there, it may become a question whether the office of Governor is one of any utility, and whether the Chief local authority at each place might not now beneficially communicate at once with the Bengal Government”

[b.] In the paper containing this recommendation of Governor Fullerton, appears the following remarks in the hand-writing of Sir William Norris, Recorder in 1836, in reference to the words above italicised, and so underlined by him: “You say so because you could thus brook the independent spirit of the man who is entrusted with the administration of that system.”

cillors in each Settlement, conducted the business of the Court, until the 30th June, 1830, when in consequence of the Straits Settlements, ceasing to form a separate Presidency, having been made subordinate to the Government of Fort William in Bengal, and the titles of the different officials who were also Judges under the Charter, being changed and consequently different from those expressed in it, the local Government were of opinion—erroneously as will afterwards be seen,—that the abolition of the presidency and the consequent change of their titles, abolished the Court of Judicature. The Notification announcing the change of Government was the following:

2ND CHARTER.
CLARIDGE, R.
1827—1829.
[COURT SUSPENDED.]
1830—1832.

NOTIFICATION.

Whereas the Settlements of Prince of Wales' Island, Singapore and Malacca, having from this day, ceased to form a separate Government, and having become Settlements subordinate to the Presidency of Fort William, according to the orders of the Honorable Court of Directors, and the Supreme Government, to be managed by a Deputy Resident, at each Settlement, subject to the general superintendence and control of a Resident or Commissioner, notice is hereby given that all official References and Reports are henceforward to be submitted in the first instance to the Deputy Resident, respectively in charge of each Settlement.

By Order,

30th June, 1830.

[Signed.] J. PATTULLO,

Secretary to Govt. [a]

The change of Government was notified to the Court by the following letter :

To

JAMES LOCH, Esq.,

Acting Registrar of the Court of Judicature of

Prince of Wales' Island, Singapore and Malacca. [b]

SIR,

I am directed by the Hon'ble the Governor in Council to report to you for the information of the Judges of the Court, that in consequence of the form of administration of the Settlements of Prince of Wales' Island, Singapore and Malacca, having been changed from that of a separate Government to Residencies subordinate to the Presidency of Bengal, the offices of Governor and Resident Councillor of these Settlements respectively, cease this day.

I am, Sir,

Fort Cornwallis,

Yours most obedt. servant,

30th June, 1830.

J. PATTULLO,

Secretary to Govt.

The following Minute was thereupon duly entered in the

[a] By a subsequent Notification dated July 1st, 1830, the following appointments were published :

R. Fullerton, Esq.,	to be Comr. for the affairs of the Settlements of
	P. W. Island, Singapore and Malacca.
R. Ibbetson, "	Deputy Resident at P. W. Island.
S. Garling, "	" " at Malacca.
K. Murchison, "	" " at Singapore.

[b] Mr. Kerr, the Registrar, was then absent in England on leave. Mr. Loch was the Registrar's "Senior Sworn Clerk" at Singapore.

**2ND CHAM-
BER.** Court Book in Penang :

CLARIDGE, R.

1827—1829.

[**COURT SUB-
PENED.**]

1830—1832.

"The Court on an attentive consideration of the above Letter, is of opinion that the discontinuance of the offices by virtue of which the Judges hold their places, necessarily withdraws the Judges of the Court, and renders the future issue of its process impossible. It is therefore resolved, that the Court do adjourn *sine die*, and it is ordered that the Registrar do place in safe custody, the Records and Muniments of the Court until called for by a regular and competent legal authority : and it is further ordered that the Registrar do transmit copies of these proceedings to Singapore and Malacca.

Court adjourns sine die."

On the 7th August, 1830, up to which date, the whole establishment of the Court in the three Settlements had continued in existence, without having any work to perform, Mr. Fullerton, signing himself as "Chief Commissioner for the affairs of P. W. Island, Singapore and Malacca," requested the Registrar "to acquaint him if any, and how many of the servants of the Court could be dispensed with at this Station, Singapore and Malacca, without causing inconvenience hereafter from the difficulty of obtaining persons of the same description equally well calculated to perform the duties, as those at present attached to the department," the result being that only the services of "such interpreters whose dismissal might hereafter be attended with inconvenience" were retained, and the dismissal in the three Settlements on the 31st August, 1830, of such "administrators of oaths, native writers, peons, and convict sweepers" as were not wanted. It would appear that shortly after the close of the Court of Judicature, an illegal Court set itself up in Singapore, and the following letter from the Acting Registrar to his Senior Sworn Clerk at that Settlement, as well as the correspondence that ensued on the subject, will speak for themselves :

REGISTRAR'S OFFICE,
PRINCE OF WALES' ISLAND,
19th October, 1830.

To

A. MARTIN, ESQUIRE,

Senior Clerk to the Registrar of the Court of Judicature, Singapore.

SIR,

I learn that you have accepted the office of Clerk to a tribunal which has erected itself at Singapore, professing to remedy the inconvenience caused by the suspension of the functions of the Court of Judicature of these Stations. The end in view is such as every one must approve, but nevertheless, this self-constituted Court is illegal, and the appearance of parties, the attendance of witnesses, and the execution of its decrees can only be insured by acts of illegal violence, the possible consequences of which, it is unnecessary to point out or dwell on. His Majesty's Court of Judicature was established to see the laws respected, and its officers cannot with propriety become Agents in the daily and systematic breach of them. It is necessary therefore that you choose between your new office and that which you hold"

I am, &c., &c.

JAMES LOCH,

Acting Registrar.

In reply to the foregoing letter, the Clerk, on the 22nd October, informed the Acting Registrar that "Mr. Murchison having asked him if he had any objections to conduct the business of the Court about to be established, he thought it

imperative on him to do so, *receiving a salary from the Government without any employment*, but now seeing his error, he intended to keep clear of all such proceedings, and had given over every document and the fees collected since the opening of the Court to Mr. Bonham, the acting Resident.”

2ND CHARTER.
—
CLARIDGE, R.
—
1827—1829.
—

The following is an Extract from the acting Registrar's letter, dated 28th October 1830, in reply to the foregoing :

[COURT SUSPENDED.]
1830—1833.

“.....
With regard to your considering it “imperative” on you to become Clerk to any Court which might establish itself at Singapore, on the ground of “receiving a salary from Government monthly without any employment,” it is necessary to observe that the Registrar is appointed by the Court and, with those under him, is paid by the Court so far as the fees extend, the East India Company only engaging to make up the difference. But the Company [*sic*] has voluntarily rendered the Court inactive, and with much inconvenience to others, has brought this upon itself, that by closing the source of fees, it has lately had to pay the whole expense of the Registrar's establishment instead of paying as formerly, only an unimportant portion of it. The servants of the Court are not to blame for inactivity thus forced on them, nor should those complain of not receiving an equivalent, who, by their own act, have taken the power of rendering an equivalent away.....”

The letter ends by taking the Clerk to task for his act, and informing him that Mr. Fullerton was leaving Penang for Singapore on the 30th October. This “self-constituted Court” nearly immediately after this closed.

As stated, Mr. Fullerton left for Singapore on the 30th October, and from thence proceeded to England, being replaced by Mr. Ibbetson as Commissioner for the affairs of the Settlements. In consequence of the opinion entertained by the local Government, that the change in the Government had abrogated the powers of the Court, it may easily be imagined what the consequences were;—the administration of Justice had entirely collapsed and a regular crisis ensued,—great agitation taking place both in Penang and Singapore, public meetings being held and petitions sent home to both Houses of Parliament. Matters thus went on, prisoners committed for trial being confined for months in Gaol, and a complete stagnation of business arising from want of confidence generally, there being no Court to enforce payment [beyond the ordinary jurisdiction of the Court of Requests, which then did not exceed \$32 in amount], or to prevent departure from the Colony,—all of which doubtless, had induced Mr. Murchison to open a Court as above stated in Singapore, with a view to “remedy the inconvenience,” in ignorance of the illegality of the measure.

Unfortunately many months had elapsed, before it was discovered that “Mr. Fullerton was mistaken in supposing that the alteration in the Government could cause the Charter to become inoperative [a],” and in a despatch dated 27th July, 1831, [b], the Board of Directors so addressed the Government of India, at the same time informing them that it had been deemed

[a] see *Caunter v. E. I. Co.*, *infra*, p. 12.

[b] see *Report of Indian Law Commissioners*, 1842, p. 48.

2ND CHAR- expedient to continue the Charter of 1826 [which Mr. Fullerton
TER. had recommended to do away with], and "in order that all doubt
CLARIDGE, R. "may be removed regarding the powers, under that Charter, of
1827-1829. "the Resident and Deputy Residents,—for the purpose of adminis-
[COURT SUS- tering Justice under His Majesty's Charter," the Resident at
PENDED.] Singapore was to be styled Governor or President of the united
1830-1832. Settlements, and the first assistant to the Resident at Singa-
pore and the Deputy Residents at the other Settlements, as
Resident—Councillors respectively. This information however,
did not reach the Straits Government till the 30th of March 1832,
when a Notification to that effect was duly published. Some of
the correspondence that passed in reference to the erroneous
impressions of the local Government, regarding the abrogation of
their powers, and suggestions that were made in consequence
thereof, in order to prevent the recurrence of such a state of
affairs, as well as "of the mischievous discussions which took
place between the late Recorder and the Government," is to be
found embodied in the "*Special Reports of the Indian Law
Commissioners*, 1842," hereinafter mentioned. Judicial power
having now been restored, the Court reopened for the first time in
Penang, under the presidency of the newly appointed Governor
[of Prince of Wales' Island, Singapore, and Malacca], Mr.
Ibbetson,—who had become, as previously stated, Commissioner,
&c., on the departure of Mr. Fullerton,—on the 9th of June, 1832,
having closed as before mentioned, on the 30th June, 1830, during
the whole of which period, the Court Establishment, although
greatly reduced, had continued to exist.

The following entry appears in the Court Records :

"IN THE COURT OF JUDICATURE OF PRINCE OF WALES' ISLAND, SINGAPORE
AND MALACCA.

Prince of Wales' Island, Saturday 9th June, 1832.

The Honorable the Governor or President, by virtue of the power vested in him by
His Majesty's Charter of Justice, authorizes the Court to sit and act in the absence of
the Recorder, the granting of such authority is hereby noticed and recorded.

Court opens accordingly.

PRESENT :

THE HON'BLE ROBERT IBBETSON, ESQ., Governor.

.....
Mr. Kerr is permitted to resume the duties of his office as Registrar and Clerk of
the Crown as heretofore.

The usual oath required by the Charter, is administered to and taken by the Hon'ble
Kenneth Murchison, Esquire, Resident-Councillor, and the administering and taking
thereof is hereby recorded.

The Registrar informs the Court what additional Establishment, which the Govern-
ment is bound to furnish, and which was temporarily dispensed with, in consequence of
the absence of the Judges, is now again required.

The Court thereupon directs the Registrar to apply to Government in the usual
way.

The Court desires the Registrar to observe the existing Rules of Practice till further
Orders."

In connection with the administration of Justice, and with

Sir John Claridge's time, it would appear that the Court had from an early period, experienced great difficulty in obtaining suitable Chinese Interpreters. The Government was communicated with on the subject, and Mr. Fullerton, the then Governor, on the 18th June, 1828, applied to the "Select Committee of Supra Cargoes" at Canton, for assistance and advice in the matter, and the following Extracts, will be read with interest even up to this day:

2ND CHAM-
BER.
CLARIDGE R.
1827—1829.
[COURT SUS-
PENDED.]
1830—1832.

MACAO,
12th August, 1828.

THE HON'BLE ROBERT FULLERTON,
&c. &c.

HON'BLE SIR,

2. It is with much regret we have to state that while we entertain every wish to comply with the request contained in the communication above referred to, we are unable to recommend any plan which promises hopes of succeeding in the desired object of employing the natives of this country in the situation of Interpreters.

3. Two obstacles present themselves to the accomplishment of this purpose, which are, in our opinion, insuperable.

The first consists in the venal and dishonest character of the Chinese, which it is lamentable to observe, pervades all ranks and classes of the people, almost without distinction, and which alone must always prove a sufficient obstacle to their employment in the *highly responsible character of Interpreters*.

4. The second objection which offers itself to our notice, arises from the variety of dialects spoken by the inhabitants of the different provinces who compose the Emigrants to the Straits, the greater part of whom are strangers to the dialect of Canton, the natives of which province alone are acquainted in any manner, with the English language, the knowledge possessed however by these persons, is perfectly inadequate to interpret the explanations and evidence upon general subjects, which must occur in a Court of Justice, and consists merely in the acquaintance of a few set phrases and Mercantile terms.

This letter, signed "W. H. C. Plowden, Charles Millett, and W. Davis," then goes on to state that "being desirous of obtaining the most satisfactory information upon the point, which appeared closely connected with the administration of Justice," the gentlemen named had "requested their Chinese Interpreter, Dr. Morrison, whose extensive knowledge of the Chinese language, was too well known to require further observation, to furnish them with his opinion upon the possibility of providing native interpreters," and concludes by calling attention "to the establishment founded by Dr. Morrison in the Straits of Malacca, for the instruction, either of Europeans in the Chinese language, or reciprocally that of Chinese in the literature of Europe, as the most probable source from whence *trustworthy and efficient Interpreters for the Courts of Judicature in the Straits* might be derived," and expressing a hope that "Chinese educated under the tuition afforded by that Institution, would imbibe a share of those principles of integrity which are *essential to persons placed in confidential situations*."*

* Note by Mr. Kerr, the Registrar, in reference to the words in italics in above letter: "These gentlemen in China, seem to be impressed with a due sense of the value of Interpretation—not so our Straits authorities, until in their own person, they feel the inconvenience."

2ND CHAIR-TER. The following was Dr. Morrison's opinion on the subject:

CLARIDGE R. To THE PRESIDENT, &c., SELECT COMMITTEE,
&c. &c. &c.
1827—1829. GENTLEMEN,

[COURT SUS-
PENDED.] Being requested to report my "opinion of the practicability of supplying efficient
1830—1832. "Chinese Interpreters for the Court of Judicature established at Penang and its
"dependencies," after a careful perusal of the Letters sent on by that Government, I
have to reply that agreeing with the sentiments of Mr. Kidd, Principal of the Anglo-
Chinese College, on the qualifications requisite to perform the duty of a Chinese Inter-
preter to the said Court, I am not aware that any such persons can be procured in Can-
ton. The Linguists, as they are commonly called at Canton, do not understand the
Fukien Dialect, which Mr. Kidd represents as so generally necessary in the Straits. As
to mere knowledge, I suppose some of the senior students of the Anglo-Chinese College
are better qualified than any other natives, but in respect of integrity, I fear all natives
are much to be doubted in important cases, and require the check of European knowledge.

I remain, &c.,
ROBERT MORRISON.

14th July, 1828.

and history here repeats itself, for our own Government till this day, experiences the greatest difficulty in obtaining suitable Interpreters, and a plan much the same as that suggested by the "Select Committee, &c.," and Dr. Morrison, has been adopted in regard to student interpreters. The business of the Court in Singapore at this period, does not appear to have been very great, for in a report to the Registrar in Penang, dated 21st November, 1828, his Senior Sworn Clerk, Mr. A. Martin,—after asking for instructions in regard to an application made by "Mr. Read, on behalf of Messrs. A. L. Johnston & Co., for letters of administration to the Estate of the late Captain Flint, R. N., as creditors of the Estate, and as having been agents of the deceased to the period of his death," and whose Will was said to be forthcoming,—stated "we have not so many cases as *before*" [*sic*] *

The practice heretofore existing of the Sheriff summoning public meetings at the request of the community, is to be found mentioned only in Sir John Claridge's time. Several inhabitants of Penang had written to the Sheriff in November, 1827, in consequence of the fees of Court having been raised, asking him to convene a meeting for the purpose of protesting against the "late greatly increased rate" of such fees, which request, the Sheriff refused to comply with "not considering himself bound to call a meeting of the nature solicited without the order of Government and of the Court." The following is an extract from a presentment presented to the Recorder by the Grand-Jury on the 1st December, 1827, on the subject, and wherein the custom in question will be found mentioned. After laying stress on the refusal of the Sheriff, the Grand-Jury proceeded as follows :

"The Grand Jury presume that custom, if not Law, has made it imperative upon the Sheriff to call, at the request of the community, any public meeting to which there can be no legal objection; but as at the presidencies of India, the

* The Court of Judicature only opened on the 9th August, 1827 !

Sheriff cannot call or allow of any public meeting without previously obtaining the sanction of the Governor in Council, the Grand-Jury consider that the late Sheriff had no legitimate cause of himself to debar the community from exercising one of the greatest privileges they possess, that of legally expressing in public assembly, any grievance, and do respectfully present to this Court, that such conduct on the part of the late Sheriff was unjustifiable and oppressive." *

2ND CHAIR-
TER.

CLARIDGE R.

1827—1829.

[COURT SUS-
PENDED.]
1830—1832.

And in regard to the question of fees, the Grand-Jury added that they did "not now present the late increase of fees, anticipating that the public would ere long express their opinion relative thereto." On the 3rd April, 1828, the Grand-Jury reiterated their grievance at the exorbitant rate of fees claimed by the Court. As hereinafter shewn, these fees formed the subject of representation on various occasions, the last in Sir William Norris' time, without however bringing any material change as a result.

Before closing with Sir John Claridge's time, it may be interesting to note, that it was during his tenure of office as Recorder, that the present Courts of Requests in the different Settlements, under Proclamation, dated 2nd December, 1828, were established. This proclamation, although abrogated materially, nevertheless forms the basis of those Courts in the different Settlements up to the present day, having been re-enacted by Act 29 of 1866. † After the establishment of the Court of Requests in Penang, appeals were "so numerous as to average from five to ten every week, owing to the facility with which they were granted; a dissatisfied party had only to express his wish, and pay down his three dollars, which was the fee, and he obtained his appeal in less than half an hour, with which he ran over to the Court of Judicature to get it filed, and a day fixed for hearing. Sir John Claridge, finding that he had to affirm almost every decision of the Commissioner, passed an Order requiring an affidavit of the grounds for appealing, and the transmission of the Commissioner's record of the proceedings before him, for consideration, previous to granting any appeal," ‡ which practice obtains virtually up to this day under section 10 of the Appeals Ordinance 12 of 1879. §

* On this subject see further, time of *McCausland* and *Maxwell*, R. R. *infra*.

† Revived after different enactments for the last time, by s. s. 53 & 54 of Ord. 3 of 1878, read in conjunction with sec. 7 of Ord. 17 of 1876, since repealed.

‡ *Report Ind. Law Comers.*, 1842, p. 203.

§ Sir John Claridge, after his recall, was never again employed under the Crown. Parliament was several times moved in his behalf, the last time as late as the 25th July, 1843, when Mr. W. E. Gladstone, in the House of Commons "moved an address to the Crown relative to the case of Sir J. T. Claridge, removed from the office of Recorder of Prince of Wales' Island, and praying, in conformity with the recommendation contained in the Order in Council in reference to his case, that he may receive an appointment in her Majesty's service, of such a class as to her Majesty may seem meet.

"Sir J. C. Hobhouse and Lord J. Russell opposed the motion, on the ground that it involved a direct interference with the prerogative of the Crown, and after some discussion, several hon. members speaking in its favour, the motion was withdrawn." *London Home News*, 7th August, 1843.

2ND CHAR-
TER.
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MALKIN B.
—
1833—1835.

Sir Benjamin Heath Malkin, "late Fellow of Trinity College, Cambridge, M. A.," was appointed "Recorder of Prince of Wales' Island, in the room of Sir John Thomas Claridge, removed by "Order of the King in Council," and he arrived in Penang on the 12th February, 1833. On his arrival, after such a state of affairs, as had happened after the recall of his predecessor, Sir Benjamin Malkin however, as he himself afterwards recorded, did not find such heavy arrears as he had anticipated, the Governor and Resident Councillors in the different Settlements, having, on the re-opening of the Court in 1832, disposed of most of the cases, a few important ones only having been reserved by them till the appointment of a Recorder [a],—a reference to such of Sir Benjamin Malkin's decisions as are reported throughout this work as still of importance, will give one an idea of their nature and intricacy. Sir Benjamin Malkin not unfrequently commented on the Charter, giving it as his opinion that it had been loosely and inaccurately framed [b.]

In 1833, Parliament provided for an enquiry into the jurisdiction, powers and rules of the Courts of Justice in the Territories of India, [3 & 4 Wm. IV., c. 85, s. s. 53, 54,]; the Commissioners under same, and as required by the Statute, being designated *The Indian Law Commissioners*. Their Report, dated as late as the 8th February, 1842, and ordered to be published by the House of Commons on the 30th May, 1843, contains 226 long pages of printed matter in reference to the Straits alone, and embodies endless correspondence and suggestions by Straits and Indian officials, as well as by the Commissioners themselves, in reference to this Colony,—impracticable schemes being propounded, nearly all differing in substance, and some having for their immediate object, the dispensation of professional Judges. Lord Auckland, the Governor-General of India, suggested the entire abolition of the Recorder's Court, and the entire re-construction of the Judicial system in lieu of "the present inefficient and costly system," and that there should be "one Magistrate and assistant at each of the three Settlements, exercising both Civil and Criminal jurisdiction;—one Resident for the three Settlements with appellate jurisdiction from the Magistrates' Courts, and holding his Court at each Settlement alternately, and that the Resident should be authorized to reserve such Civil or Criminal cases as he might think proper for trial before one of the Judges of the Supreme Court of Calcutta or Madras, who should once a

[a.] "I found no heavy arrear of business awaiting me, as I had expected; a very few causes indeed there were It is true that the Court had been for several months re-opened, but Mr. Ibbetson who had despatched a great deal of Criminal business, had, as far as he could, postponed all Civil business for my arrival."
Sir B. Malkin to Govt. of India, 16th Sept. 1837.

[b.] "I have often had occasion to advert to the very loose manner in which the Charter constituting the Court of Judicature is framed," and again "The same Charter [i. e. of 1807 to Prince of Wales' Island] with very few modifications, though many might have been beneficially introduced to suit the altered circumstances of the Settlements, was granted to Prince of Wales' Island, Singapore and Malacca The whole Charter is in many respects so ill-devised an instrument, as applied to the present jurisdiction of the Court, that difficulties must always arise in considering it."
Sir Benj. Malkin, Report of Ind. Law Comers., 1843, pp. 78, 119, 120.

year, or oftener, make a circuit in the three Settlements." Suffice it however to say, that none of the suggestions were ever carried out, and that matters remained in *status quo*.

2ND CHAM-
BER.
MALKIN R.
1833—1835.

It was during the tenure of office of Sir Benjamin Malkin, that the Legislature of India, having been vested with Legislative powers [3 & 4 Wm. IV., c. 85, s.s. 43 *et seq.*], passed enactments called the "*Indian Acts*," a great many of which, passed expressly for the Straits Settlements or purposely extended to the Territories under the Government of India generally, are still in force here. It may also be mentioned, that it was greatly due to Sir Benjamin Malkin's exertions, though passed after his time, that Act XX. of 1837, relating to the devolution of property of deceased persons, as chattels real, was enacted. [a] Prior to 1834, all Indian and local enactments were called *Regulations*, and great doubts existed as to the validity of those passed here, for a considerable period. [b]

At the closing of the Penang Session of Oyer and Terminer, on the 9th April, 1834, the Grand Jurors in their presentment, complained to the Recorder, as they had previously done to Sir

[a] "These Settlements are mainly indebted to Sir Benjamin Malkin for the recent Act No. XX. of 1837" Norris R.,—30th November, 1837, [Charge to Penang Grand Jury].

[b] One of those Regulations is still in force here, although recently amended by the local Government, but that one had however been previously submitted to and approved by the Governor-General of India in Council. [Regulation III., A.D. 1833—*Registration of Imports and Exports*...amended by G. N. 28th December, 1833]. According to some of the correspondence on record, which passed between Mr. Dickens and the then Acting Lieutenant-Governor, in reference to the case of Carni [ante p. xv.], on the subject of a Regulation passed by Mr. Phillips, which Mr. Dickens considered *ultra vires*, it would appear that the power of framing Regulations was vested in the Governor-General of India by 13 Geo. III., c. 63, s. 36. [1773]. The following is an Extract from one of Mr. Dickens' letters to Mr. Phillips on the subject, dated 9th April, 1803, [which letter must have been unknown to the different Recorders who also questioned the validity of those Regulations, including Sir Benjamin Malkin, who treated the subject at some length in one of his letters above alluded to, before his departure from Penang]—the preceding paragraphs of the letter, it will be seen, refer generally to the question, and to Mr. Dickens' mode of action: "2. Perhaps it may be necessary, to avoid misconception of the principles, upon which I have acted, as Judge and Magistrate, since my arrival at this Settlement, on the 7th of August, 1801, that I should state the reasons upon which I have acted, and shall continue to act, upon some Revenue and Police Regulations, passed by the Lieutenant-Governor, prior to the 7th of May, 1802; After this period, by the positive directions of the Vice-President in Council, that day communicated to me, by Sir George Leith, every Regulation for the good order, and civil government of this Island, which the Lieutenant-Governor might propose, prior to its being carried into execution, as a law, was to receive the approbation, and confirmation of His Excellency the Most Noble the Governor-General in Council, at Fort William in Bengal."

"3. If it is permitted me, to compare small things with great, then let me say that I framed a line of conduct for myself, as Judge and Magistrate [of an Island which does not possess any civil or criminal laws] in analogy to the principles contained in an Act of Parliament, which takes into its purview, a state of society, not very unlike that which exists now at Prince of Wales' Island.

"4. I allude to the 13th of Geo 3rd, Chap. 63, s. 36; which gives the Governor-General in Council, at Fort William in Bengal, lawful authority from time to time, to make and issue such Regulations, for the good order, and civil government of the Settlement at Fort William, and places subordinate, or to be subordinate thereto, as shall be deemed just, and reasonable, such regulations not being

2ND CHAR-
TER.
—
MALKIN R.
—
1833—1835.

John Claridge,* of the high-rate of fees charged by the Court, and that "in touching upon the subject of the fees of Court, they begged to do so with the greatest respect. They were however of opinion that the expenses of legal proceedings were generally susceptible of reduction, particularly as regards the percentage levied as Court charges on filing petitions and affidavits, and on the amount of judgment, which in many cases operated to such a degree as to prevent Suitors from coming into Court. In laying this matter before his Lordship, the Grand Jury were aware of the difficulty and delicacy of the subject, and had only been induced to represent it in consequence of these expenses pressing so heavily upon the community," and on this subject, the records again shew that the Grand Jurors on the 29th November, 1837, informed the then Recorder, Sir William Norris, that "they had received numerous complaints in respect of the high rate of Court fees, and begged respectfully to present them for revision, considering their present rate as a prohibition of Justice to the poor, and a most unreasonable charge." The scale of fees passed, as before stated, in the time of Sir John Claridge, continues in existence with very slight modifications, to the present time.

Sir Benjamin Malkin, before leaving the Straits in 1835, addressed several letters to the local Government, containing suggestions "which he conceived likely to prove useful to the legislative authorities in the preparation of new regulations, and in framing a new Charter of Justice of the Settlements." Some of these, of no importance at this date, are to be found in the Court records as well as embodied in the Report of the Indian Law Commissioners, before alluded to. † Sir Benjamin Malkin greatly deprecated the idea of abolishing the professional judgeship, and among other instances, instanced cases of Insurance and International Law, as peculiarly requiring the presence of a professional Judge. He left for India in June, 1835.

GAMBIER R.
—
1835—1836.

Sir Edward Gambier, appointed to succeed Sir Benjamin Malkin, arrived in Penang on the 26th June, 1835, but did not however, remain here long, being appointed in September, 1836, to a Puisne Judgeship in Madras. The only matter requiring notice

"repugnant to the Laws of the realm; And to impose, and levy, reasonable fines and forfeitures, for the breach of such regulations; But nevertheless such Regulations shall not be valid, or of any force and effect, until duly registered, and published in the Supreme Court of Judicature, with the consent, and approbation of the said Court; And the Governor-General in Council is to transmit copies of the said Regulations, to one of His Majesty's principal Secretaries of State.

"5. Thus, I have acted in analogy to the principles of that Statute, in carrying into execution as Judge and Magistrate, some Revenue and Police Regulations, enacted and published by the Lieutenant-Governor of this Island;... prior to the 7th May, 1802, I was left to the exercise of a sound discretion, I had neither laws nor precedents, to assist my judgment, and these Revenue and Police Regulations did not appear to me either unjust or unreasonable, in the existing of men and things on this Island; and I perceived nothing in the said Revenue and Police Regulations, repugnant to the laws of the realm of England."

* ante p. lxxv.

† Extract of one of which letters is published in "*Papers and Correspondence, Land Revenue Administration*," 1884.

in the latter's time is, in regard to pleadings,—he entirely dis-
countenanced the system of pleadings which had been inaugurated
by Sir Ralph Rice, and which had been already greatly modified
by Sir Benjamin Malkin. *

2ND CHAB-
TER.
—
GAMBER R.
—
1835-1836.

At the August Session of Assizes, 1836, the Grand Jurors laid great stress on the fact of the Calendar being increased by "many petty cases which had, up to a late period, been decided by the Magistrates in Quarter Sessions, some Criminals thereby receiving a greater measure of punishment, inasmuch as they were frequently incarcerated for several months previous to their trial for an offence to which such imprisonment alone—was more than disproportionate, the principle being lost sight of that 'the more immediately after a crime a punishment is inflicted, the more just and useful it will be'" and after commenting upon several other local matters, concluded their presentment by "offering to the "Honorable the Recorder their congratulations on his advancement to the Madras Bench, but at the same time, the Grand-Jury could not but express their regret, that no sooner had a "Recorder resided long enough in these Settlements to enable "him to become acquainted with the manners and customs of the "various population, than he was removed to another part of India "—a system which they considered to be highly prejudicial to the interests of the community." †

Sir Edward Gambier, was succeeded by Sir William Norris, who had previously been Chief Justice of Ceylon. He assumed duties on the 29th September, 1836. The Court was granted Admiralty Jurisdiction shortly after his arrival [6 & 7 Wm. IV., c. 53]—*Letters Patent* for carrying out the Act, dated 25th February, 1837, being duly proclaimed in open Court on the 23rd October of that year, the Registrar of the Court being also appointed Registrar on its Admiralty Jurisdiction, and the Sheriff as Marshal, the Sheriff however, on his appointment every year, appointing his Deputy as Deputy Marshal of the Vice-Admiralty Court as well.

NORRIS R.
—
1836-1847.

The Records do not shew how and what fees were claimed under the Act, for Sir William Jeffcott, a subsequent Recorder, on the 30th January, 1855, wrote to the then Governor, Colonel Butterworth, regarding the absence of any authorized table of fees for the Admiralty Court, the Governor informing him in reply on the 27th February, 1855, that he had forwarded his letter to India, "pointing out this very anomalous state of affairs." On the 10th of August, 1855, the then Governor E. A. Blundell, received a reply from the Secretary to the Government of India, informing him "that the Honorable the President in Council, did not see why Admiralty fees, past or future, should go to the officers of the Court, when all other fees go to Government. On the other hand, the officers, His Honor in Council conceived, should be fairly remunerated for Admiralty work, unless it was a part of the understanding when they were appointed, that they were to do all the work of the

* *Report Ind. Law Commrs.*, 1842, p. 208.

† On this subject see further, end of time of Norris, R. *infra*.

2ND CHAM-
BER.
—
NORRIS B.
—
1830—1847.

Court on their present salaries. Unless this were the case, His Honor in Council, was of opinion, that the average of fees should be struck, and extra salaries allowed to the officers accordingly," and the Governor was further requested "to submit for sanction in the usual form the amount which he would propose that each officer should receive as additional salary." From a letter of the Registrar on record, dated 17th June, 1856, to the "Resident Councillor of Prince of Wales' Island," it would appear that "all Admiralty fees as were received by the Registrar at this Station, were not kept separate and withheld from the Treasury as was the case at Singapore, but were mixed up and sent into the Treasury from month to month, as they were collected, with the fees received on all the other sides of the Court in which fees are allowed to be taken." The records shew nothing further on this point, but as will be seen hereafter, on the Proclamation of the 3rd Charter in March, 1856, till April, 1861, all fees of office were kept by the Registrars,* and Admiralty fees are received until the present day by the Judges, Registrars and Marshals.

Admiralty Jurisdiction was thus given to the Court after the lapse of very many years, and after repeated representations both by the authorities and the Grand Jury, papers from Mr. Dickens bearing date 8th November, 1803, being also on record on the subject, the result having been that previous to the grant of Jurisdiction, the authorities had been powerless to act, the records shewing, number of prisoners charged with piracy, *released* for want of authority to deal with them, and in other cases, some few being sent to Calcutta for trial in the very early days, without these however, shewing any result whatever. †

In their presentment to the Recorder on the 29th March, 1837, the Grand Jury "concurred with the Recorder in considering that "minor offences should be disposed of summarily before Quarter Sessions. Not only was there much inconvenience felt by the "public generally, and the Grand and Petit Juries, by having their "time so long occupied in the examination of trivial offences, but "also his Lordship's time unnecessarily trespassed on and his "attention taken from more important duties, that the "Jurisdiction of the Court of Requests might be beneficially "extended to a larger amount, with power of appeal to the "Supreme Court, and generally that the ends of Justice and the "dignity of the Law would best be maintained by having *only* "important causes, whether Civil or Criminal, tried by the Recorder, "while a salutary controul should constantly be exercised over the "inferior Courts." The Grand Jurors then proceeded to deprecate the "change which they had been given to understand was "in contemplation, of withholding the Charter of the Court, and "substituting in its place a Company's Charter, being deeply im- "pressed with the necessity and propriety of having an English

* On this subject, see further, time of McCausland and Maxwell, B. R., Ch. vi.

† *Vide, Res. v. Noquedah Allong & ors., Criminal Rulings, Vol. II. of these Reports.* 1, 2

“Court of Judicature presided over by a professional Judge, to guard the interests, and protect the liberties of so large a population and extensive a trade.” This apprehension of the Grand-Jurors, doubtless arose in consequence of some of the recommendations contained in the Report of the Indian Law Commissioners, as mentioned in the time of Sir Benjamin Malkin.

2ND CHARTER.
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NORRIS, R.
—
1836—1847.

At the June and December Assizes, 1845, the records shew that the Grand Jurors again moved in the question of the Jury, and “the fact that all the Province Wellesley planters had been exempted from the Panel Roll, a practice opened to several objections. The immunity thus granted to so large a portion of our small community, made it necessary that the names of each individual member of the different mercantile firms should be placed upon the Panel Roll the Jurors were put to very great inconvenience, and prosecutors and witnesses as well as accused parties themselves suffered very great hardship, by having petty cases brought up before the Court instead of their being disposed of by the Magistrates in Quarter Sessions. This was a matter that had been repeatedly represented by former Grand Juries, and the Grand Jury respectfully solicited the Court would be pleased to bring to the notice of the proper authority, the urgent necessity of a reform in this point.” The Jury question is one not without great difficulty in Penang, even to this day.

The records of 1838, shew some amusing correspondence between the Court and some of the inhabitants of Penang, one letter dated 25th May, 1838, being addressed to an Agent of the Court, Mr. Carnegy, by the Registrar, at the request of the Recorder, calling upon him as one of the managing Committee of a local newspaper, the *Pinang Gazette*, in consequence of two anonymous letters that had appeared therein “reflecting upon the judicial character and proceedings of the Recorder,” to apologize *within 6 hours* to the latter for the publication of the “calumnies,” or to suffer his name to be erased from the Rolls of the Court, under the powers vested in the Recorder under the Charter, “without assigning any reason whatever.” Mr. Carnegy immediately apologised disclaiming any knowledge or participation in the publication of the letters and his intention of giving up all interest in the paper. Another letter, dated 25th June, 1838, is from two Merchants of Penang who, having heard that Sir William Norris, whilst delivering judgment in a case wherein they had been called as witnesses, had said that they had evinced in their evidence “that want of candour characteristic of British Merchants,” inform the Registrar that they could not “permit such opinions to be expressed without refutation,” and proceed to take the Recorder to task,—the latter personally answering their letter on the 6th July, 1838, and informing them “that their proceedings implied a lamentable want of consideration on their part,” and warning them of the consequences they had run, for he could not believe that “the letter was written with a deliberate intention to insult the Court of Judicature, and to brave the

2ND CHAR- consequences to which in that case they would have rendered
TER. themselves liable."

NORRIS, R. In 1840, Sir William Norris extended to Malacca, some of
1836—1847. the Rules and Orders of Court in force both in Penang and Singa-
pore. It was also in that year, that he inaugurated the present
system of swearing native witnesses under Act 5 of 1840 [a], they
having previously been sworn in a "manner and form most bind-
ing upon their consciences," i. e., according to their several reli-
gions and customs. [b]

On the 23rd June, 1845, Sir William Norris granted an extra-
ordinary application, and the only one of its nature to be met with
in the records in Penang: "The Grand Inquest having returned a
true Bill in the cause of the *Queen versus Joseph Donnadiou* for man-
slaughter, whereunto the said Joseph Donnadiou said he would plead
Not Guilty, he the said Joseph Donnadiou further said he was an
alien, and was born in Marseilles in parts of France, under the allegi-
ance of the King of the French, and he prayed the writ of Our Lady
the Queen to cause to come here certain aliens who together with
certain Jurors now "on the Panel would form a Jury of half
aliens and half natives to try the issue of the said plea according
to the form of the Statute in such case made and provided, and it
was granted to him to be tried by a Jury, *de mediatate linguæ*." The
prisoner was tried by the Jury allowed him, and acquitted on
the 25th June, 1845. The Charters no where authorized such a
Jury, and now, by Section 31 of Ordinance 6 of 1873, it is strictly
prohibited. By the laws of the Colony, aliens are not excluded
from the Jury. *

Some of the records during this Recorder's long tenure of
office, disclose more forcibly the feeling that had existed before
his time in regard to the relations between the Government and
the Bench. Sir William Norris, following in the wake of his pre-
decessors, frequently laid stress on the defective system of the
constitution of the Court, in its connection with the Executive,
whereby their relative functions continually clashed, and recom-
mended "the complete separation of the Judicial and Executive
branches." He expressed himself in very strong terms on the
subject, a few months after his arrival in a charge to the Grand-
Jury, on the 30th November, 1837, telling them that "their senti-
ments with regard to the incongruous union of Judicial with
Executive functions were entirely his own. This had from
the commencement been the greatest difficulty with which the
Court of Judicature had had to contend, the most formidable
obstacle to its unity, celerity and efficiency of operation
He had never concealed his settled conviction [*and it was the*

[a] See *In re Native Witnesses*, Penang Assizes. *Criminal Rulings*, Vol. II. of
these Reports.

[b] See Charters as well as case tried by Mr. Dickens in 1805, *Ramalinga Putty*
v. *Mootee Samee*, ante p. xxxv.

* See *Regina v. Khoo Ghee Boon*, *Criminal Rulings*, Vol. II. of these Reports.

"conviction of all his predecessors] that the constitution of this Court was essentially defective, and that it never could work so well as it should do, until freed from all connection with the Executive authorities. The same anomalous system had been successively abandoned at all the Presidencies and in Ceylon, much to the advantage of the respective Governments, the Judges and people, and it was high time, that it should be abandoned here also," and nearly five years after on the same subject, in a letter dated 12th September, 1842, to the local Government, who had requested his opinion on the Report of the Indian Law Commissioners, he thus wrote :

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 ———
 NORRIS, R.
 ———
 1836-1847.

"The greatest improvement on the present system, and that which would be at once the most efficient and the most acceptable to all classes would be a complete separation of the Judicial and Executive branches. At Singapore, or wherever the fixed residence of the professional Judge may be, experience sufficiently proves that the Lay Judge will scarcely ever be likely to thwart or interfere with the general business of the Court. The unhappy disputes between Mr. Fullerton and Sir John Claridge furnish, it is true, an instance to the contrary ; but the proposed withdrawal of the Governor's Judicial functions for the future, is a sufficient guarantee, with the casting vote, which should still be reserved to the professional Judge, against the recurrence of similar difficulties." *

In connection with this matter, it may here be stated, that questions not unfrequently arose as to the respective powers of the professional and lay Judges, and of the right of the former to sit on appeal on the decisions of the latter,—a marked instance of this occurring in the case of the *Iron Queen*, on the Admiralty side of the Court, which had been heard and determined in Singapore, on the 17th September, 1846, in the absence of the Recorder, by Mr. Thomas Church, the Resident-Councillor at that Settlement, and who was one of the Lay Judges of the Court. The Resident Councillor had passed a decree for the possession of the vessel to be given to the owner's agent, and condemned the Captain of the vessel in costs, which costs not having been paid, the Captain was arrested and lodged in Jail, under the process of the Court. On the arrival of Sir William Norris on circuit, on the 26th November, 1846, the Captain presented him with a petition complaining against that portion of the Resident-Councillor's order as condemning him in costs, and pointed out that his resistance of the claim by the Agent, was due to his doubts of the *bonâ fides* of the power of Attorney under which the Agent claimed to act, as he [the captain] had received no instructions from the owners to give up the ship or leave his post. Sir William Norris, being satisfied with the correctness of this statement, and considering the order of the Resident-Councillor as to costs, unjust, granted a Rule calling on the owners to shew cause why the order of the Resident Councillor regarding the costs should not be reviewed and set aside. The Resident-Councillor, thereupon, filed a protest to the granting of the Rule, and stated that he would be "greatly wanting in regard for his own public character, and the position he held as a Judge of the Court, did he countenance or concur

* *Rep. Ind. Law. Comers.*, 1842, p.p. 222, 3.—See also by way of illustration, *In re Charles Maitland*, 13th August, 1828, mentioned in the time of *Claridge, R.*, ante p. lxxv.

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—
NORRIS, R.
—
1836—1847.

“ in the novel, and unprecedented proceeding of the Recorder,—
“ he had held that the Master could have enter-
“ tained no just doubt as to the genuineness of the power of Attor-
“ ney, and undertook the judicial business of deciding the case,
“ not from choice, but as matter of duty. That the point was
“ dependent entirely on matters of fact,—and from his age, ex-
“ perience and situation, he was as capable of deciding, as his
“ colleague, the Recorder, on a question of fact such as this,—
“ particularly—as he happened to have heard the case, and had had
“ the witness before him. That under the Charter, the Court,—
“ composed of the three Judges, one professional and two lay,—
“ alone could review his decision, but there was no warrant for
“ the interposition of one of the Judges in the acts of another,
“ in cases similar to the present.” Sir William Norris, notwith-
“ standing the protest of Mr. Church, had the Rule argued before
“ him on the 1st December; and on the 19th January following,
“ 1847, delivered judgment, making the Rule absolute, and revers-
“ ing the order of the Resident-Councillor as to costs, holding that
“ he, as professional Judge, had power under the Charter, to set his
“ lay brethren right when they had erred, considering that “ the
“ Lay Judges were, by the Charter, nominated as such solely *vir-*
“ *tute officii* as the chief Executive Authorities of the Settlements,
“ whose offices required knowledge, experience, and abilities of
“ various kinds, diplomatic, military or commercial, but neither
“ necessarily nor probably, implied the possession of any judicial
“ qualifications or experience whatsoever.” On the 2nd Febru-
“ ary, 1847, the Resident-Councillor placed a minute on the files of
“ the Court, protesting against the remarks of the Recorder, and
“ fearing “ lest silence would be construed into an acquiescence
“ in the doctrines advanced by the Recorder, as to the relative posi-
“ tion of the Judges, under his Majesty’s *Letters Patent*, of 27th
“ November, 1826,” and after touching on the expediency of making
“ the Recorder an Appellate Judge, recorded his opinion that the
“ Recorder possessed no such power, and as one of the Judges of
“ the Court, ordered his minute to be filed in Court, attached to the
“ order of the Recorder, as a protest thereto. The Recorder, having
“ subsequently objected to this minute remaining on the files of the
“ Court, it was withdrawn by the Resident-Councillor [a].

Notwithstanding the differences that existed between the

[a] The case in question is not reported in this work, as bearing no longer on any point whatsoever; the constitution of the Court having materially changed. It was published in a pamphlet form, shortly after the issue of the case in 1847. In connection with the view taken by Mr. Church in this matter, it may here be said, that he had a few years before, expressed himself in a somewhat similar manner. In his remarks, dated 24th September, 1842, on the Report of the Indian Law Commissioners,—who had recommended “ a Court in each Settlement, presided over by the Chief local authority, with a Recorder going on Circuit with power to call up any cases which he considered to be proper subjects for adjudication by himself,”—Mr. Church observed “ that should this be persevered in, a greater calamity could scarcely befall the Straits Settlements: the incontrovertible consequence would be to encourage extensive litigation, prove dilatory, and of necessity be attended with considerable expense to parties, evils which scarcely exist under the present system. If every case, however simple, which is heard and decided by the superior lay judge is open to appeal to the professional judge, and that learned person is allowed to exercise the special powers

Recorder and the Executive, the records shew that he, from the time of his arrival,—in the example of several of his predecessors,—acted as Law Adviser to the local Government, who, from the time of the discontinuation from office of Mr. W. Caunter, as their Law Agent, in 1830,—and the relinquishment of that office also by Mr. Balhetchet [a] shortly after his appointment on the 25th February, 1834, in succession to Mr. Caunter, had no legal representative [b], a system against which some of the Recorders, not only demurred against, but pronounced as unjust both to themselves and the parties who appeared before them, as placing them in a most anomalous position. A reference to the case of *East India Co. v. Scott* [c.], and *Edwards v. East India Co.* [d.], will forcibly show the mind of the Recorder on the subject. This system apparently lasted till within a few years before the transfer of the Colony from India, in 1867, the records shewing that Mr. Thomas Braddell, [afterwards Attorney-General in 1867], was appointed “Crown Counsel at Singapore” in January, 1864, and Mr. Daniel Logan, [Solicitor-General in 1867], as “Crown Prosecutor” in April, 1865. Prior to this, in the more important actions either instituted by or against them, the Company retained Special Agents, and in most of the cases, they were not represented at all. The inconvenience must have been felt by the authorities themselves, for by a letter dated 3rd June, 1843, the then Governor, Mr. E. A. Blundell, appointed,—doubtless in a way as a remedy for the evil,—several officials to represent them “in all actions in Her Majesty’s Court, wherein the interests of the East India Company or their Government may be concerned, and as the Resident-Councillor may consider most convenient and proper on the occasion,” these officials being “Mr. W. T. Lewis,

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“accorded to him, there will be no end of litigation it will tend to bring
“the executive officers holding judicial appointments into contempt I have no
“hesitation in saying, that I conceive a lay judge, who, from a long residence in the
“country, intimate knowledge of the language and manners of all classes of
“natives, will be found generally more competent to judge correctly in matters of
“fact than a professional judge who has spent the best years of his life among Europeans
“and prone to believe everything because it is sworn to” And the following
“was his opinion of the native character “ My own experience enables me to
“say the Chinese and others are in a state of moral degradation almost beyond concep-
“tion. I witness daily, nay hourly, instances of natives uttering the most deliberate
“falsehoods on the most trifling occasions; and what will they not fabricate when their
“personal interest is concerned?” *I. L. Co. Rep.*, p. 214.

[a]. The exact date of Mr. Balhetchet’s relinquishment of the post cannot be found, but from the records, he appears to have been alternately a Government official and a Law Agent.

[b]. See *William Caunter v. East India, Co.*, *infra*, p. 12. It would also appear from the records, although it may well be that he was originally appointed to hold the two appointments simultaneously, that during the tenure of office of “Registrar,” by Mr. Duff, he also acted as “Law Officer to the Hon’ble Co.,” his name appearing in the latter capacity as early as December, 1814, but no trace can be found of his letter of appointment as such, nor is mention made in his appointment of Registrar, of his having been a professional man. Mr. Duff, although “Law Officer of the Hon’ble Co.,” was held by Stanley, R., not to be in the position of the Attorney or Solicitor-General, and therefore could not enter a *Nolle Prosequi* to an indictment. [*King v. China Toh*, 3rd Dec. 1814, *not reported.*] See however *King v. Cousens*, alluded to in page liii *supra*.

[c]. *Infra*, p. 63.

[d]. *Magistrates’ Appeals*, Vol. III. of these Reports, p. 6

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1836—1847.** Assistant-Resident, Lieutenant Ferrier, Superintendent of Province Wellesley, Mr. G. F. Gottlieb, Harbour-Master, and Mr. N. M. McIntyre, Assistant in the Land Department," the latter however in land matters only,—a similar letter, dated 28th January, 1848, authorized "Mr. H. Nelson, Assistant-Resident of Prince of Wales' Island," to act in a similar capacity, and even in regard to the majority of these, it may here be said, that their names do not appear at all in the Court Records.

A scarcity of copies of local Regulations or enactments, concerning which the Recorders were called upon to pronounce, seems also to have been felt during Sir William Norris' time [a], indeed as felt, although to a lesser degree by our own Government, in regard to the local Ordinances. A short time before his departure, Sir William Norris, in a letter dated 24th October, 1846, addressed the Governor-General of India, regarding the promulgation of Act III. of 1847, vesting the appointment of Constables and Peace Officers, in the Executive, a right which, by the Charter, had been vested in and hitherto exercised by the Court,—although it will be remembered, that the refusal of Sir Edmond Stanley, to have anything to do with these appointments, had been the cause of early dissension between him and the local authorities. Sir William Norris doubted of the legality of the contemplated measure, considering it at conflict with the Charter, and complained of the want of courtesy shewn him in his not having been consulted, before the framing of the Act. The following extract from his letter, apart from this circumstance, will prove interesting as bearing on a point mentioned in connection with his time :

" I deem it also the more incumbent upon me to bring the circumstance, with all due respect, to the notice of the Supreme Government, because, having already tendered to her Majesty, the resignation of my Office, I feel that my successor might justly complain, were I to pass over in silence, a mode of proceeding which however unimportant to myself personally on the eve of my retirement, can scarcely, I submit, be regarded as consistent with the courtesy hitherto generally accorded by the Local Authorities to the Office which I have had the honor to hold for the last ten years ; during which period, I may add, these Authorities have freely sought what has been as freely afforded, my professional advice on all needful occasions of which surely, the measure in question, directly affecting as it does the Court of which I am the responsible head, was one."

In answer to his representations, the Indian Government by letter, dated 19th December, 1846, expressed regret at Sir William Norris not having been consulted, and attributed the fact to oversight, but at the same time informed him that his objections had, prior to the receipt of his letter been maturely considered, and that they were clearly of opinion that the proposed measure

[a] "The scarcity of all the Government Regulations, and the difficulty of obtaining a complete copy, [I have none myself, that of the Court is imperfect, and I was obliged to borrow one for the occasion] has long formed a subject of a just complaint The very limited number of copies would be a hardship even were they models of perspicuity and precision, but the hardship is increased by the acknowledged difficulties and obscurities with which they abound." *Sir Wm. Norris.* See *Edwards v. East India Co.*, Magistrates' Appeals, Vol. III. of these Reports.

was not at conflict with the Charter, giving out their reasons. The effect of this measure, as will be seen further on, again formed the subject of discussion between two of the later Recorders, on the promulgation of the third Charter in 1855.

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Sir William Norris, was the only Recorder who remained in office continuously for a long number of years, nearly all his predecessors, with the exception of Sir Edmond Stanley and Sir Ralph Rice, who were here eight and seven years respectively, being transferred to some other Indian presidency after a comparatively short tenure of office. Papers are to be found,—apart from the presentment of the Grand-Jury to Sir E. J. Gambier on the subject, in August 1836,—where mention is made of that fact, and Sir Benjamin Malkin, who had himself been transferred to India, subsequently advocated the abolition of the system of translation, giving it as his opinion, that there “was no good reason for its continuance, for the Straits furnished very little apprenticeship for the continent of India,”* an opinion in which Sir William Norris “entirely concurred.”†

Sir William Norris left Penang on the 9th June, 1847 [a] and was succeeded by Sir Christopher Rawlinson, “Recorder of Portsmouth,” on the 4th of August of the same year. During the interval between the departure of Sir William Norris, and the arrival of Sir Christopher Rawlinson, Mr. Salmond, the Resident-Councillor of Malacca, who had just resumed duties after leave of absence, was appointed by the Governor, Colonel Butterworth, under the powers vested in him by the Charter, as a Lay Judge of the Court at that Settlement, to sit in the absence of the Recorder. Mr. Salmond, on the 10th June, 1847, accordingly proceeded to the Court-House to take the oaths of office, but being ill at the time, remained in his carriage. Mr. Lewis, the “Accountant-General” of the Court in Penang, and who had been acting for Mr. Salmond, thereupon requested the Senior Sworn Clerk in charge, Mr. B. Rodyk, to have the Court opened, and Mr. Salmond afterwards sworn as a Judge of the Court in his carriage. This, the Clerk objected to, but being pressed by Mr. Lewis, he opened the Court in the usual form, and then, in company with Mr. Lewis, “proceeded downstairs to the Government Treasury at the Stadt House, and administered to the said J. W. Salmond,

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* *Rep. Ind. Law Comers.*, 1842, p. 114.

† “I entirely concur with my predecessors Sir John Claridge and Sir Benjamin Malkin, in thinking that a Judge in these Settlements should never be transferred to the Indian Bench. These Judges both wrote to the home authorities strongly deprecating the practice, and Sir Benjamin’s promotion was not of his own seeking. How far the decisions of these questions might affect my own private interests, I cannot tell, but I have felt it my duty to express my opinion thus publicly without reference to my own individual claims.” *Norris, R.*, charge to Penang Grand Jury, 30th Nov. 1837.

[a] “Sir William Norris was admitted to the bar by the Hon. Society of the Middle Temple in 1827, and two years afterwards proceeded to India, where he practised with considerable success. In 1835, he was appointed Chief-Justice of Ceylon, having previously acted as a puisne Judge there, and in 1836, he received the appointment of Recorder of Prince of Wales’ Island, &c., retired on pension in 1847—died at Ashurst Lodge, Sunningdale, 7th September, 1859.” *London Globe*, Sept. 10, 1859.

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Esquire, the usual oaths *in his palanquin carriage*, opposite the said Treasury door, after having previously and respectfully stated his objections against the legality and formality of the oaths so administered." Mr. Rodyk immediately afterwards reported the matter to the Registrar in Penang, who [the Recordship being vacant], communicated with the Governor, pointing out that the oaths were nugatory. Colonel Butterworth in a letter dated 22nd June, 1847, signified to Mr. Salmond his disapprobation of the course adopted by him, remarking that such irregularity could not be permitted, and that "he thought it imperative that he should be sworn in as Judge of Her Majesty's Court of Judicature *in open Court*," and required him "to proceed to Singapore by the earliest opportunity, and there be sworn in." This was accordingly done by Mr. Salmond, and the papers in connection with the matter afterwards forwarded by the Governor to the Registrar to be filed in the Court Records.

As stated above, the power of authorizing the Resident-Councillors in each Settlement, to sit in the absence of the Recorder, was vested in the Governor by the Charter, each authority granted being duly forwarded to the Registrar in Penang and registered. This system was inaugurated in Sir Benjamin Malkin's time. It would appear that doubts had been at one time raised, as to the legality of holding a Court at any one of the Settlements without the presence of the Recorder, but they were overruled by Sir Benjamin Malkin as shewn by the following extract from one of his letters to the Government of India, dated 16th September, 1837:—

"I found the Court in operation at all the Settlements and felt that it was not exceeding its power, except indeed that the necessary preliminary of a regular authority by the Governor so to act, had been omitted. This however was supplied for the future; and as far as ratification could supply the want of previous authority, for the past also, and no one ever raised the question whether that ratification would be advisable. The only difficulty that I have heard suggested on this subject was, that it seemed contrary to the notion of a single Court that it should be holding concurrent sittings in different places at the same time, and that on this ground an Act of Parliament had been required in England to enable the Quarter Sessions to hear Appeals and Criminal Cases at the same time in different rooms. The argument is not without force , but I thought the provisions of the 13th page of the Charter too decidedly contemplated the occurrence of such proceedings to make me hesitate about upholding them, even if I might have felt that there was doubt enough to prevent me from recommending such a course, if hitherto unpractised. To procure its abandonment on any ground of illegality, would have been to declare void all the proceedings had under it; and this of course I could not do, without being satisfied that they were so, which was not my opinion."

Sir Christopher Rawlinson assumed duties in August, 1847. It is in his time, that *Punghulus* or "Native head-men," are first-mentioned in the records. These native head-men, appointed under a purely Malay custom, necessarily nowhere appear in any of the Indian enactments connected with these Settlements, nor has the term been met with under any denomination whatever in any of the early local Regulations, unless they can, in some degree, be associated with the Native Captains of the early days.* In

* *ante* p. xxiii.

Malacca, "a question having been raised whether Punghulus ought to be considered as Constables, it was determined to refer the case to the professional Judge, as they had been sometimes sworn in at the Quarter Sessions, and it would be dangerous to the life of a Peace Officer in which capacity he acts, should it not be recognized." The papers were sent to the Registrar from Malacca on the 10th July, 1847, together with a "copy of the oath written in the Malayan character taken by the Punghulus occasionally, in open Court of Quarter Session,"* but the question does not appear to have been brought before the Recorder. By Ordinance 1 of 1872, s. 1, the Governor may invest any *Punghulu* with the powers of a Police Officer or Constable, every *Punghulu* so invested, being subject to the several provisions of the Ordinance relating to the duties of Peace Officers.

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In Sir Christopher Rawlinson's time, jurisdiction was conferred on the Court, by 12 Vict., c. 21, for the relief of Insolvent Debtors, the Recorder being the sole "Commissioner" or Judge of the Insolvent Court. Rules, Orders and Tables of fees, in connection therewith, were duly passed on the 6th November, 1848, and confirmed by an Order of her Majesty in Council, dated 29th June, 1849; the jurisdiction thus conferred, constituted a *quasi* distinct branch of the Court of Judicature, the seal bearing the device of the Royal Arms, and the inscription: "Court for the Relief of Insolvent Debtors."

In their presentment to the Recorder, at a Session of Oyer and Terminer held in July, 1849, the Grand-Jury recommended "that witnesses attending the Court of Judicature during the Criminal Sessions should be paid for the time they were absent from their work," but nothing came of the recommendation. Compensation to witnesses was first fixed by the Order in Council, dated 2nd May, 1872, since amended by Order dated 24th November, 1881.

It was also during this Recorder's tenure of office, that the Straits Settlements ceased to be subordinate to the Presidency of Fort William in Bengal, and were placed in direct correspondence with the Government of India.†

Sir Christopher Rawlinson frequently laid stress on the defective system of prison discipline, and stated that although the High-Sheriff was nominally the person charged with the control and superintendence of the Gaols, yet, owing to his being annually

* The following is a copy of the translation of the oath on record, forwarded with the above :

"I affirm before God Almighty, that I Punghulu of promise to do all that is right and just with a clean heart, towards the English Government, and that I shall follow and obey all Company's order; if any person or persons are going to create any disturbance or row, in my district, that I shall be obliged to inform the Chief Authority in Malacca, or his deputy, or whoever acts or receives power from him; and that I rely with confidence in the decisions of the English Company; and I also promise to improve the country by cultivation, and to advance the welfare of the inhabitants: this is my faithful undertaking with the Government of the English Company.

Written at Malacca "

† Proc. 1st Aug. 1851, *Calcutta Gazette*, p. 899, Index to Laws S. S., Pt. II., p. 2.

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JEFFCOTT, R. Sir Christopher Rawlinson was succeeded by Sir William Jeffcott, who arrived in Penang, on the 2nd February, 1850, but apart from several important cases decided during his time, the passing of several Rules and Orders of Court, including that of the 21st January, 1852, before alluded to, regarding the admission of Advocates and Solicitors of the Court, and a letter dated 24th November, 1851, from Governor Butterworth, who was about to go on leave, informing the Recorder that “he could not resign the Government into other hands, without bearing testimony to the kind courtesy which marked his Honor’s intercourse with the authorities, during the period he had held the high and honorable office of Recorder,” the records disclose nothing deserving special mention beyond presentments of the Grand-Jury in July, 1854 and June, 1855, complaining as in the time of Sir William Norris, that “the frequent occurrence of the Sessions rendered the duty a severe tax on the time of those whose attendance was required as Jurymen, and more particularly on those residing in the Province, some of them at a distance of 25 miles.”

Sir William Jeffcott died in office on the 22nd October, 1855, being the second Recorder, since the time of Sir Francis Bayley, whose death had occurred in Penang. At the time of his death, Sir William Jeffcott had been appointed first Recorder of Singapore, under the new Charter of the Court, † as hereinafter mentioned. [a]

* *Vide*, time of Sir Benson Maxwell R., *infra*. pp. xcvi., xcvi.

† *Vide* third Charter, p. 8.

[a] “Sir William Jeffcott was born in Ireland in 1800—was of the Irish Bar and went the Munster circuit. In 1842, he emigrated to Australia; before leaving Ireland, he was presented by the bar and Solicitors, with handsome pieces of plate in testimony of their high sense of his merits—While in Australia, he officiated as a Judge of the Supreme Court at Port Phillip—he returned to Ireland and resumed practice at the bar, and held a legal appointment under the Attorney-General of Ireland. In 1840 appointed Recorder of Prince of Wales’ Island, &c.”

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At this period, it is stated that great dissatisfaction prevailed, especially in Singapore, owing to there being but one professional Judge for the three Settlements,—the decisions of the Lay Judges giving cause for complaint, [a] as well as the lengthened periods during which the Recorders,—who had all, as before stated, made Penang their head-quarters [b],—visited Singapore and Malacca, they going on circuit generally to those Settlements, but twice a year, [c] and that principally to hold a Court of Oyer and Terminer, and to dispose of such cases as had been reserved for them by the lay Judges, whose judicial duties also, had so much increased, as to greatly interfere with their other more legitimate duties. It may here be said however, that in Penang, the records shew, that whenever in office, the Recorders had practi-

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[a.] On this subject, see the following extract from the evidence of Mr. Young, "Commissioner employed by Government to make enquiries into the condition of the Settlements in the Straits," given before the Indian Law Commissioners, and which is a comment upon a decision delivered by Mr. Bonham in Singapore in the absence of the Recorder:

"I will give as an illustration of the necessity of a professional Judge, a case " which occurred while I was in the Straits.

"The indorsee of a bill of lading, in which freight was expressed to have been " paid in London, brought an action against the captain to recover the goods, he having " refused to deliver them on the ground that the freight had not in fact been paid. " After the merits of the case had been investigated, the defendant objected that the " plaintiff had no sufficient interest in the goods to maintain the action. No Recorder " was present, and the unprofessional Judge decided that the objection was fatal, though " the merits of the case were clearly with the plaintiff. It is generally understood " that this decision is wrong in point of law." And the Indian Law Commissioners added: "a strong instance in support of his [Mr. Young's] opinion." *R. I. Law Commers.* pp. 139, § 23 & 150. The decision in question [*Robert Jack v. James Pasley*, April, 1838], is not here given, but is reported at length by the Commissioners in their Report, p. 228.

[b.] Sir Benjamin Malkin, gave the following as his reason for living in Penang: "Indeed the most difficult and complicated cases in point of evidence have generally arisen in Penang, where the earlier occupation of the island has given more opportunity for the creation of complicated family relations, and doubtful and imperfect derivative titles. It was partly from the accident of my visiting Penang first, partly at the suggestion of the officers of the government who wished me to have my own house, where they had no public buildings available for my occupation, and would therefore have had to incur expense in procuring me accommodation if I only visited that place on circuit, that I fixed my principal residence there; but I felt fully convinced afterwards, that partly for the considerations I have mentioned, partly for temporary and occasional reasons, which it is not necessary to discuss, it was the place in which it was most desirable, for the general administration of justice in the Straits, that I should spend the longest time. And the same would I apprehend, be the case with my successors to the present time. Had I considered the services of the Recorder desirable, as is suggested with reference chiefly to the European portion of the population, of course, Singapore ought to have been my principal residence; but I entirely deny the existence of any such reason: as Europeans I never considered them entitled to any preference." *I. L. Co. Rep.* p. 112.

[c.] "More than two circuits in a year, never have been made, last year [1836] there was but one circuit made, and though the Recorder staid a long time in Singapore, that was an accident." *Rep. Ind. Law Commers.* 1842, p. 105. "I was never more than 6 weeks at Singapore on any single circuit." *Malkin R., id.* p. 110.

3RD CHARTER. cally always been the sole Judges, the lay Judges only sitting with them occasionally at the opening of the Criminal Sessions. [a]

M'CAUSLAND, R. On the application of the East India Company, a third Charter
1856—1866. of Justice dated 12th August, 1855, was granted, and duly ratified by Act 18 & 19 Vict., c. 93, s. 4, the preamble to which recites the reasons for the granting of the Charter, *viz.*, "that the population and commerce of Singapore having greatly increased, made it desirable that there should be a professional Judge for that Station." This was about the only difference that existed between the Charter and the previous one, the new one granting a resident Recorder for Prince of Wales' Island, and another for Singapore. [b] The Court continued under its designation of "Court of Judicature of Prince of Wales' Island, Singapore and Malacca," the Governor and Resident-Councillors at each Settlement being also Judges of the Court. By an Order of the local Government, dated 9th May, 1856, in accordance with the provisions of the Charter, the jurisdiction of the Court at Singapore, was extended to Malacca, and that of the Court at Prince of Wales' Island, to Province Wellesley. The Charter was duly proclaimed in Singapore, on the 22nd March, 1856, Sir Richard Bolton McCausland, "of the Irish Bar"* and Sir Peter Benson Maxwell, "of the English Bar," † being the Recorders appointed to Singapore and Prince of Wales' Island respectively, the first named Recorder in the room of Sir William Jeffcott, who, as before stated, had died shortly after the issue of the new Charter. Sir Benson Maxwell took the oaths of office on the 20th March in Penang, and assumed duties on the 4th of April, "the *Letters Patent* reconstituting the Court of Judicature having been proclaimed in open Court at Singapore on the 22nd day of March" as before stated. On the proclamation of the Charter, all the appointments held under the previous one ceased to exist. The Charter, dividing the Court into two divisions, required the appointment of two Registrars, and authorized the Judges to appoint one at each division. Mr. Alexander John Kerr, who had, as before stated, been appointed Registrar in 1818, and who, shortly after the proclamation of the 2nd Charter in 1827, had become "Registrar of the Court of Judicature of Prince of Wales' Island, Singapore and Malacca," [as designated by the Charter], exercising control over the Registries at the two last named Settlements, where there were each a "Senior Sworn Clerk," in charge, taking orders direct from him,—was offered one of the Registrarships, but declined taking office, and retired on a pension after nearly 38 years' service. Many are the opinions of the highest officials on record, testifying to the estimation in which this gentleman

[a.] In the Court copy of the Report of the Indian Law Commissioners, setting out certain recommendations of Governor Bonham in 1842, in regard to the Lay Judges, is to be found the following note in the hand-writing of Sir Benson Maxwell: "I never received a day's assistance from the Lay Judges. P. B. M."

[b.] See *Ong Cheng Neo v. Yeap Cheah Neo & ors*, *infra*, p. 343.

* "Was Secretary to his uncle, Lord Plunkett."

† "Called in 1841, and went the Home Circuit—was one of the Duke of Newcastle's Scutari Hospital Commissioners."

was held.* Mr. Kerr, although not a professional, was held in great repute as a lawyer, and the records abound with papers and legal opinions of his, drawn up at the request of the Executive, by whom he was frequently consulted. The different Charters laid down, that the Registrar,—whose duties under that title, have from the first Charter, included those of Master in Chancery, Clerk of the Crown and of the Peace, Taxing Officer, &c.,—should be paid by fees, but the comparatively small amount of business in early days, not admitting of this, in October, 1827, the Government undertook,—as had prevailed under the first Charter,—to pay the Registrar and his Clerks fixed salaries, the fees appertaining to the office, being paid into the Treasury. Mr. Kerr declined taking office under the new arrangement owing to the salary offered him, the Registrarships being fixed at 700 Rupees each *per mensem*, being less than half of what he had been drawing as Registrar of the three Settlements, *viz.*, 17,556 Rupees *per annum*. The newly appointed Registrars at Penang and Singapore, Messrs A. Rodyk and H. C. Caldwell, previously Senior Sworn Clerks to the Registrar at those Stations, also declined accepting the salary offered them, as inadequate, and preferred drawing the fees of office allowed them by the Charter, undertaking to pay their own clerks, an arrangement which the East India Company sanctioned until the 1st April, 1861, when in accordance with *Letters Patent*, dated 28th November, 1860, all fees received by the Registrars, Sheriffs and Coroners were directed to be paid into the Treasury, and salaries allowed on an increased scale. The Registrars, under more recent enactments, in addition to the functions already mentioned, perform several other semi-ministerial and semi-judicial duties in the absence of a Judge from the Settlement.

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M^CCAUSLAND,
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Soon after assuming duties, the Recorders commented upon the Charter, and declared that it did not appear to them to have received greater attention than the previous one. The new Charter provided for the appointment of Constables and Peace Officers by the Court,—a prerogative, it will be remembered, which had been withdrawn from it in 1847, by Act 3 of that year,—and for the inspection of roads, bridges, &c., which had passed over to an Assessment Committee, under Acts 12 of 1839 and 12 of 1840. Sir Benson Maxwell was of opinion that the Charter had superseded the Act, which vested the appointment of Constables in the Executive, Sir Richard McCausland being of a different opinion. In the meantime however, the Governor proceeded to make the appointments as heretofore, when a Rule *Nisi* was moved for and obtained in Singapore, by the Justices of the Peace, against one of the Constables, calling upon him to shew cause why a *Quo Warranto* should not be filed against him. Sir Richard McCausland, in a long judgment dated 21st July, 1856, setting out his reasons, again held that the Act III. of 1847, had not been repealed by the Charter of 1855, and that the appointment of the Constable was perfectly valid. Considerable doubts existed as to the soundness of this decision,

* See also, *Report on the administration of the Straits Settlements*, 1855-1856, § 21.

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but the new Police Act XIII. of 1856, coming into force, the matter dropped. Soon after this, Sir Benson Maxwell proposed to rescind an order of Court, dated 4th October, 1827, creating a Sealership to the Court, and directing certain fees to be paid therefor. He considered the appointment illegal and void, as not being created by the Charter, and having no legal connection whatever with the Court, and proposed that the Registrars or their clerks should take possession of the Seal, and the practice of levying fees at once discontinued. Mr. Blundell, the Governor, declined to adopt the course suggested, considering that a Sealer was necessary, but that he thought the Seal should be abolished and Stamps used. Sir Richard McCausland stated as his opinion that although the Sealership might be illegal, yet he considered it would be necessary to obtain the sanction of either the Crown or Legislature or both to discontinue it, before Sir Benson Maxwell's suggestions could be adopted. Correspondence continued on the subject, until at last Mr. Blundell suggested that the correspondence should be sent to India, Sir Benson Maxwell informing him that "the transmission of the correspondence to India was no reason for the perpetuation of the illegal practice of claiming Sealer's fees,—that the duty of regulating the fees of the Court officers, rested wholly with the Governor and the two Recorders, and they could not get rid of the responsibility which rested upon them by refusing to act without instructions from the Government, for the Charter gave the latter no power or authority over those questions." The whole correspondence was however forwarded to the Government of India, who eventually, entirely agreed with the view taken by Sir Benson Maxwell. The opinion of the Advocate-General of Bengal, dated 1st December, 1858, was duly transmitted to Mr. Blundell, by letter dated 5th January, 1859, from the Secretary to the Government of India, requesting that the "sinecure office" be forthwith abolished, and that the Seals be entrusted to the several Registrars or their Deputies, and that no fees be demanded for affixing seals to documents.* On the receipt of this letter, Mr. Blundell drew up the following Order of Court, abolishing the Sealership, [which had been held for some years by Mr. W. W. Willans,] and after obtaining Sir Richard McCausland's signature to same, by letter dated 4th February, 1859, forwarded the Order to Sir Benson Maxwell "trusting that he would approve of and adopt it." The following was the Order in question:

IN THE COURT OF JUDICATURE OF PRINCE OF WALES' ISLAND,
 SINGAPORE AND MALACCA.

Wednesday, the 2nd day of February, 1859.

General Order.

It is this day ordered that the Table of Fees, settled the 4th day of October,

* By the Order of Court, dated 4th October, 1827, "a fee of \$1" was allowed "every time the seal was affixed to any Process during the Court hours, viz., from 10 A. M., to 3 P. M., and \$2 after office hours."

1827, be altered, by omitting therefrom the Sealer's fees.

[*Sd.*] E. A. BLUNDELL,

[*Sd.*] R. B. McCAUSLAND,

[*Sd.*] P. BENSON MAXWELL.

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On receiving the aforementioned letter, containing the Order, Sir Benson Maxwell, wrote the following letter to Mr. Blundell: MAXWELL, R.
1856-1867.

RECORDER'S CHAMBERS.

PENANG,

February 9, 1859.

To

THE GOVERNOR OF THE STRAITS,

HON'BLE SIR,

I return herewith the Order of February 2nd, with my signature. I have no objection to it, for it is the Order which I proposed to make as long ago as March, 1857, and again in December of the same year, but for the reasons I stated in my letter of the 18th February, 1858, I consider it now unnecessary.

I have, &c.,

[*Sd.*] P. BENSON MAXWELL.

The appointment of "Sealer," was not confined to any particular Settlement, and correspondence is to be found where "packets-of signet" were forwarded to the Registrar in Penang, by the Sealer or "Sealer's Agent," in whichever Settlement situated. As will be seen therefore, these "signets" had to be indented for in the regular way. By Section 32 of Ordinance 3 of 1878, the Seal of the Court [in triplicate] is ordered "to be kept in the custody of the Registrar or Deputy Registrar at each Settlement," and as laid down by Section 33, bears a device of the Royal Arms of the United Kingdom, and the Exergue "The Seal of the Supreme Court of the Straits Settlements," the Seal of the Registrar bearing the same device with the inscription "Registrar of H. M. Supreme Court, Settlement of _____," according to the Station. The former Seals, bore the same device and inscriptions, —being Courts founded by Royal Charter,—the title of the Court only,—Court of Judicature—differing from the present one, as hereinafter mentioned.

Another matter arose some time after the Sealership question had been brought forward by Sir Benson Maxwell, and related to the Sheriffship. From the time of the first Charter in 1808, the Governors annually appointed the High-Sheriffs, the latter appointing their own Under-Sheriffs or Deputies, who were allowed a monthly salary of "\$100 or 210 sicca rupees" by the Government, the High-Sheriffs receiving the fees. On the proclamation of the 2nd Charter in 1827, the salary was continued by the Government, and by an Order of Court dated 27th October, 1827, the Under-Sheriffs were also allowed to receive in excess of their salary, one-half of the fees granted the Sheriffs. This arrangement continued in force until 1832, when on being appointed Sheriff for that year, Mr. Salmond kept all the fees, a precedent which was adopted by nearly all his successors,—the Under-

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 ———
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Sheriffs, besides having all the work to do, furnished security to the Sheriffs for the discharge of their duties. Sir Benson Maxwell was of opinion that the High-Sheriffship was a complete sinecure, and as had done Sir Christopher Rawlinson,* proposed its abolition. Considerable and animated discussion again ensued upon this point between the two Recorders and Mr. Blundell,—the latter and Sir R. McCausland differing in opinion with Sir Benson Maxwell. The Governor again declined carrying out any change without the previous sanction of the Indian Government to whom he referred the matter, when in September, 1859, the fees attached to the Sheriffship were ordered to be paid into the Treasury, and the Sheriff and his officers allowed salaries. This arrangement was further carried out under the *Letters Patent* of November, 1860, when the Registrars and Sheriffs strictly became Executive Officers. The Title of High-Sheriff seems to have been dropped from this time, and after the transfer of the Colony, by Ordinance 30 of 1867, Section 20, the High-Sheriff is spoken of as Sheriff of the Colony. In 1868, the records shew that Sir Benson Maxwell again moved in the question of the Sheriffship. He proposed the abolition of the High-Sheriffship [presumably the Sheriff of the Colony], and recommended “the appointment of a High Bailiff for each Settlement, and in the same manner as the subordinate officers of the Court,”—he considered the Colony “had no need of the services of Vice-Comes, the Deputy of the Earl of the County, but a few officers to execute the process of Court,” † and suggested that the County Court Act 8 & 9 Vict., c. 95, s.s. 31 & 33, furnished suitable provisions, which could be adopted. This suggestion however, was not carried out in its integrity, but the office of High-Sheriff was practically merged into that of a Sheriff for each Settlement under Section 22 of Ord. 5 of 1868, and these offices continue in existence up to the present time, though under more recent enactments.

Shortly after the proclamation of the 2nd Charter, the Sheriff was entrusted with the charge of the Civil and Criminal Gaols of the Colony, such powers being in turn delegated by them to their Under-Sheriffs. This change was effected by a letter dated 25th October 1827, from “Mr. John Anderson, Secretary to the Government,” to the different Resident-Councillors in each Settlement,—and communicated to the Registrar—requesting them “to deliver over the Jail and prisoners to the Deputy Sheriffs when called by them to do so, and that lists of prisoners be immediately framed.” The immediate result of this change in Penang was, that on the 2nd February, 1828, the Under-Sheriff for that year, Mr. C. Trebeck, ‡ “found it necessary to resign the office, which it was impossible for him to execute to the extent which it was now thought necessary.”

The Deputy Sheriffs were allowed an “European Gaoler and

* ante p. xc.

† Govt. Gazette, 1868, p. 77.

‡ See List of Agents, &c., infra

a staff of peons" in each Settlement, and this system continued in force, until the passing of Ordinance 14 of 1872,—carried into effect at the latter end of 1873,—when the Government took over the entire charge of the Gaols, the Sheriffs being relieved of that duty.

The custom mentioned in the time of Sir John Claridge, of the Sheriff summoning public meetings* seems to have died out,—except as to his taking votes at the election of Municipal Commissioners, under Act 27 of 1856, sec. 9,—on the Sheriff becoming an Executive officer.

A serious embroilment occurred in 1859, between the Recorder of Prince of Wales' Island, Sir Benson Maxwell, and the Governor Mr. Blundell, in regard to certain malpractices of the Police as had come out in evidence before him, in the course of several actions that had been brought against them [a], and principally against the head of that Department, Mr. Robertson, the Deputy Commissioner of Police, in Penang. One of the cases arose in connection with one Meh, a Malay woman, who had been taken into custody by the Police, in connection with a gang robbery in Province Wellesley, and who after having been illegally detained by them for some time, were accused of having kidnapped and deported the woman to Quedah, they afterwards, in the course of an enquiry into another case before the Recorder, alleging that she had been deported at the request of the Rajah of that place. The Recorder disbelieved this story, and laid the whole case before the Governor, who, replied that he was of opinion that the charge brought against the Police, and especially against Mr. Robertson, was without foundation. The Recorder however was determined to sift the matter, and personally corresponded with the Rajah of Quedah on the subject, and through his own exertions, obtained the release of the woman after a detention of six months in that territory. The result of this case and other matters in connection with it, led to angry correspondence between the Recorder and the Governor, resulting in both addressing the Government of India. The records shew that Mr. Blundell was entirely acquitted of the charges brought against him by the Recorder, Mr. Robertson "severely reprimanded and cautioned as to his future conduct," and the Recorder informed that "her Majesty's Government while giving him full credit for the motives by which he was actuated," requested him to "abstain from all interference with matters not falling within his province as the Chief Judicial Authority of the Settlement."

From 1857 to 1860, Sir Benson Maxwell seems to have been frequently consulted by the local authorities as to the provisions of the Municipal Act 27 of 1856, and on the subject of Chinese Secret Societies, in reference to which, he drew up lengthy papers containing suggestions regarding same.

It was in Sir Benson Maxwell's time, as Recorder, that a

* ante p. lxxiv.

[a.] Some of these cases, still bearing on points of law, are reported in this work—see *Che Him & ors. v. Robertson & ors.*, *infra*, p. 131.

3RD CHAR-
TER.
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3RD CHAR- white man was, for the second time, hanged in Penang, the first
 TER- case having occurred on the 24th November, 1809, when a Euro-
 M'CAUSLAND, pean named Thomas Courtney, a gunner of Artillery, was hanged
 R. for the murder of a fellow-gunner named Thomas Shields, whom
 1856—1866. he shot dead on the 19th October, 1809, whilst relieving him from
 guard at Fort Cornwallis. * Duly recorded is to be found a long
 MAXWELL, R. letter from the prisoner addressed to the Recorder, imploring for
 1856—1867. mercy, and giving out a statement of the whole of his rather ad-
 venturous career.

The second case alluded to, was that of a seaman named Phillip Carter, who along with 17 others, were arraigned on the 4th August, 1858, for mutiny and the murder of one Nathan Williams, the Chief Mate of the American ship *Golden State*, in the harbour of Penang, on the 19th July, 1858. Three of the men were found guilty, and sentenced to death, the rest being discharged, Carter suffering the last penalty of the law on the 11th August, 1858, and the sentence against the two others, as shewn by the Calendar, commuted to penal servitude for life. These two cases are the only ones of the kind in Penang, as regards Europeans and Americans.

The records shew several Europeans sentenced to death in the early days of the Colony, for offences then so punishable, and the sentences subsequently commuted to transportation. The power of transportation was originally vested in the Court by the first Charter, and subsequently under Act 53 Geo. III., c. 155, s. 121. Europeans sentenced to transportation were sent to *Botany Bay*, New South Wales, and Natives to Fort Marlborough [Bencoolen], the presidency of Bengal, Tenasserim, Amboyna and lastly in 1858 to the Andaman Islands.

The first case of transportation on record, as regards Europeans, is that one of Patrick Deans, who was sentenced on the 14th April, 1809, to be transported to Botany Bay for five years for larceny. The system of transportation of Europeans lasted, at least as regards India,—for in the Straits, the practice had all but died out, owing to the few serious cases dealt with against Europeans,—until the year 1854, when on the 24th November of that year, the then Recorder, Sir William Jeffcott, was informed by the Governor,—who also transmitted correspondence on the subject between the Home Government and the Government of India,—“that her Majesty did not consent to European convicts sentenced to transportation by the Civil Authorities in India, being sent to any of the British Colonies,” and that arrangements were about to be made for the erection of a Prison, where “Europeans sentenced by any of the several Courts may be kept in confinement, and that the Law relating to transportation, as regards British subjects would be referred to the Legislative Council.” In the meantime, the Royal Order in Council, dated 6th June 1855, was passed, authorizing transportation of British

† See *Re v. Courtney*, Criminal Rulings, Vol. II. of these Reports.

subjects to Western Australia, instead of New South Wales, until the passing of Indian Act 24 of 1855, substituting penal servitude for transportation as regards Europeans and Americans, and the Order of the Governor-General of India in Council, dated 21st January, 1859, under the aforesaid Act, as to the mode of imprisonment.* The last transportation case to be met with in the Penang records in regard to Europeans is dated 27th April, 1838, when Sir William Norris sentenced one George Grace, an artilleryman "convicted by confession of cutting and wounding with intent to do some grievous bodily harm," to be transported to New South Wales for 14 years. Transportation was done away with by the Penal Code, and Ordinance 3 of 1872, s. 7.

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1856—1866.

MAXWELL, R.
1856—1867.

During Sir Benson Maxwell's tenure of office as Recorder of Penang, he did away with a very long standing custom, that had prevailed from the proclamation of the first Charter in 1808. It had been the practice at the opening of the Court every day, for the High-Sheriff or his Deputy, along with his staff, each carrying a long wooden-rod painted white and black, the white carried by the Sheriff or Deputy, and the black ones by the Bailiffs, accompanied by "one Jemadar and 2 Sontabadars," and of the three last named, two holding each a silver-plated dragon-head staff or stick, and one a long silver-plated stick, to receive the Recorder at the entrance of the Court and to conduct him to the Bench, remaining standing until the Court had been proclaimed. The Jemadar and Sontabadars in addition to two peons, formed part of the Recorder's Establishment. On assuming duties in Penang, after the proclamation of the Charter in Singapore, Sir Benson Maxwell discontinued the practice above alluded to, supposed to have originated in India, and the Judges ever since are received by their own immediate staff, but still conducted to the Bench by their peons, holding the staves and stick mentioned, and standing as the Court is being formally opened. These staves, at least those in Penang, of a peculiar Indian make, date from early this century, and were doubtless imported at or shortly after the proclamation of the first Charter, for in a "list of furniture attached to the Court House" amongst the records of 1810, the staves and stick are to be found mentioned. In a list of "Muniments, Records, &c., of the Court of the Judge and Magistrate" [Mr. Dickens], on record, no mention is made of them, and they are noticed for the last time on the 3rd November, 1855, after the death of Sir William Jeffcott, when the Registrar informed the Resident-Councillor, that "in consequence of the office of Recorder being vacant, the Jemadar and Sontabadars with the silver sticks carried by them, had been requested to place themselves at his disposal, as they formed no part of his [the Registrar's] department." These staves or sticks may therefore be looked upon as one of the oldest institutions of the Court, and correspondence on record would imply that the custom

* see *Calcutta Gazette*, 1859, p. 208, or *Index to the Laws of the Straits Settlements*, Pt. II., p. 57.

3RD CHAIR-TER. mentioned above, was done away with by Sir Benson Maxwell for economy sake. The Government of India had recommended a reduction in the Recorder's staff, including the two sontabadars, whereupon the two peons and Jemadar alone were left to the Recorder, the Jemadar having his title changed to that of head-peon. Sir Benson Maxwell's Jemadar, was an old Bengali named Imami, who had served under almost all the Penang Recorders, and professed to remember Sir Edmond Stanley, the first Recorder. When Sir Benson Maxwell retired in 1871, Imami went to Bangkok where he died.

The Recorders under the Indian Government, had a military guard on their house, and were allowed a salute of thirteen guns on leaving or arriving at the Settlement. Sir Benson Maxwell was the last Recorder who had these privileges. When he lived at Suffolk House, in Penang, there was a sepoy guard always at his house, but when he moved to the Hill [where he resided for 8 years] this was dispensed with.

MAXWELL, R. Sir Richard McCausland remained in Singapore from the time of his appointment, and of him the records in Penang, shew nothing beyond what has already appeared herein. He left for England in August 1866, when he was succeeded by Sir Benson Maxwell as Recorder of Singapore, Sir William Hackett, previously Chief-Justice of the *Gold Coast* Colony, succeeding Sir Benson Maxwell as Recorder of Prince of Wales' Island.

HACKETT, R. The Governor and Resident-Councillors, although nominally Judges of the Court, had, at this time, all but ceased to take part in the administration of Justice as regards Singapore and Malacca, for, as before stated, Penang had always enjoyed the presence of a Recorder. After the transfer, by Ordinance 3 of 1867, s. 1., the Governor ceased to be a Judge of the Court, and by Ordinances 30 of 1867, and 5 of 1868 [s.s. 1, 4—8], the Resident Councillors also so ceased by implication.

CHAPTER VII.

CONTENTS.

The Transfer.

1867—1885.

The formal transfer of the Colony from India is effected—the Statute—Letters Patent—the transfer since when mooted—date of transfer—Government Notification—Officers of Court of Judicature under Letters Patent, to hold their appointments under new Government—Recorder of Singapore styled Chief-Justice, S.S.—Recorder of Penang, designated Judge of Penang—Chief-Justice gazetted member of the Legislative Council—Law Officers of the Crown—Attorney-General—Solicitor-

General—Mr. Thomas Braddell—Mr. Daniel Logan—Admiralty jurisdiction of the Court—assimilated to other similar Courts—Statute—Vice-Admiralty Court of the S. S.—procedure—Order of Queen in Council—Governor—title of Vice-Admiral—Chief-Justice, Judge, V. A. C.—appointments of Deputy Judges, Registrars, Marshals and Surrogates—Court of Judicature abolished—Supreme Court of the Straits Settlements—Charter ceases to have any operation—Sir Benson Maxwell and Sir William Hackett continue to hold office—Insolvent Court abolished—Bankruptcy jurisdiction—Sir Benson Maxwell retires—Sir Thomas Sidgreaves succeeds him—his services—great changes in the constitution of the several Courts of the Colony—Civil and Criminal—Supreme Court abolished—reconstituted under four Judges—how styled—residence—Sir Thomas Sidgreaves and Sir William Hackett—continue to hold office—Mr. Snowden—Mr. Justice Phillippo—Senior and Junior Puisne Judges—Mr. Justice Ford—his services—Sir William Hackett relieved by Mr. Justice Ford—never four Judges at one time in the Colony—jurisdiction of Court of Requests—modification—Malacca and Province Wellesley—Ordinances—Supreme Court divided into two Sides—plea and summary—jurisdiction—division of the work of the Court—Deputy Registrars created—Summary side of the Court—Criminal jurisdiction—Magistrates' Courts—Coroners' Courts—jurisdiction and procedure—definition—jurisdiction and powers of Magistrates' Courts—Coroners' Courts as now regulated—further Criminal Court—Court of Quarter-Sessions—created originally by first Charter—when ceased to exist—Magistrates authorized to dispose of cases within their jurisdiction—when Court resuscitated—Senior and Junior Puisne Judges—jurisdiction of the Court—when again abolished—jurisdiction conferred on two Magistrates—Court of Oyer and Terminer—Grand Jury abolished—Special and Common Jury—prisoners tried upon a formal commitment—appeals from decisions of Supreme Court—King or Queen in Council—Court of Appeal constituted—abolished by effect of subsequent legislation—when revived—practice and procedure—number of Judges reduced to three—Chief Justice and Puisne Judges—Mr. Justice Phillips—Mr. Justice Wood—his services—Supreme Court again reconstituted—position and status of Judges and Court officers—the Court further reconstituted—Judicature Acts and Rules—Equity and plea sides of the Court abolished—branches of law fused—English Rules of practice and procedure introduced—present guide to practice and procedure in Civil Cases—Summary Side abolished—Deputy-Registrar and staff incorporated with Registrar's Department.

In 1867, by Act 29 & 30 Vict., c. 115, and by *Letters Patent*, dated 28th December, 1866, the formal transfer of the Colony from the Indian Government was effected,—a subject which had been mooted by the Colony as far back as 1858. On the transfer, which took place on the 1st April, 1867, and by Government Notification of the same date, "all officers of the Court of Judicature, holding appointments under *Letters Patent* dated 10th August, 1855, continued to hold their appointments under the Government of the Straits Settlements under the aforesaid *Letters Patent*." By this Notification,* it was also announced that her Majesty had been pleased to approve of the Recorder of Singapore being styled Chief-Justice of the Straits Settlements, and the Recorder of Penang designated Judge of Penang. By further Notification of the same date, the Chief-Justice, in pursuance of her Majesty's Order, was Gazetted an *ex-officio* member of the Legislative Council, which position he still holds. In the same year, the Law Officers of the Crown were duly appointed, and styled Attorney-General and Solicitor-General of the Straits Settlements, the latter stationed in Penang, the posts being held by Messrs. Thomas Braddell and Daniel Logan as before mentioned, the latter of whom is still in office and the former retired.

The Admiralty Jurisdiction of the Court was also in this year

THE TRANS-
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* See also Ordinance 3 of 1867, s. 4.

SUPREME COURT. extended and assimilated to similar Courts existing in other British Dominions, by 30 & 31 Vict., c. 45, under the designation of the Vice-Admiralty Court of the Straits Settlements, which still exists; the procedure thereof being now regulated by Order of the Queen in Council, dated 23rd August, 1883. Under the Statute mentioned, read in conjunction with 26 Vict., c. 24, the Governor of the Colony, derives his title of "Vice-Admiral," the Chief-Justice being styled "Judge;" by the latter are appointed the Deputy Judges, Registrars, Marshals and Surrogates of the Court.

MAXWELL, C. J.
1868—1871.

HACKETT, J.
1868—1875.

By Ordinance 5 of 1868, the Court of Judicature of Prince of Wales' Island, Singapore and Malacca was abolished, and the Court reconstituted under the title of the Supreme Court of the Straits Settlements. By the same Ordinance, the Charter or *Letters Patent* of 1855 ceased, [except as to such of its provisions as were not inconsistent with the Ordinance] to have any operation in the Colony. Sir Benson Maxwell and Sir William Hackett, continued to hold office in the Colony, as Chief Justice of the Straits Settlements and Judge of Penang respectively under Section 6 of the Ordinance mentioned.

In 1870, the Insolvent Court,—mentioned in the time of Sir Christopher Rawlinson, and which from that time had been in existence,—was abolished, and Bankruptcy Jurisdiction conferred on the Supreme Court by Ordinance 21 of 1870, which is still in force.

SIDGREAVES, C. J. Sir Benson Maxwell retired in July, 1871, and was succeeded by the present Chief-Justice Sir Thomas Sidgreaves [a], and in the following year, great changes in the constitution of the several Courts of the Colony, both Civil and Criminal, were introduced. By Ordinance 5 of 1873, the Supreme Court, as constituted under Ordinance, 5 of 1868, was abolished, and the Court reconstituted under four Judges styled Chief-Justice, Judge of Penang, Senior and Junior Puisne Judges,—the Chief-Justice and Senior Puisne Judge being required to reside in Singapore, and the Judge of Penang and Junior Puisne Judge, in Penang. Sir Thomas Sidgreaves and Sir William Hackett, continued to hold their respective offices, until the coming into operation of the aforesaid Ordinance 5 of 1873, when Mr. Snowden, then Senior Magistrate of Singapore, and Mr. Justice Phillippo, previously a Puisne Judge of the Supreme Court of British Guiana, became Senior and Junior Puisne Judges respectively. † Mr. Snowden however, remained in office but a very short time, being transferred to Hong Kong as Puisne Judge, and was replaced by Mr. Justice Phillippo,

SNOWDEN, J.
PHILLIPPO, J.

[a] "*Sidgreaves, Sir Thomas*, Knight Bach. [1873], B. A., of the London University,—Called to the bar, Inner Temple, June, 1857; member of the northern circuit; appointed Chief-Justice of the Straits Settlements in September, 1871."—*Colonial Office List*, 1885.

† G. N. 13th Feb. 1874.

who, in his turn was succeeded by Mr. Justice Ford* as Junior Puisne Judge.† Sir William Hackett was absent at this time, and was relieved by Mr. Justice Ford in Penang, and as a matter of fact, there never were four Judges at one time in the Colony.

SUPREME
COURT.

SIDGWAYS,
C. J.
FORD, J.

By the same Ordinance, the jurisdiction of the Court of Requests was reduced to suits not exceeding ten dollars, but this was somewhat modified as regards Malacca and Province Wellesley, by Ordinances 4 and 5 of 1874. Consequent upon this change in the Court of Requests, the Supreme Court was divided into two Sides,—plea and summary,—the latter having jurisdiction over suits exceeding \$10 to \$500, and as regards Malacca and Province Wellesley, from \$50 to \$500. In order to carry out the work of the Supreme Court, as thus divided, the Office of Deputy Registrar was created at Singapore and Penang, to take charge of the Summary Side of the Court in those Settlements.

As regards Criminal Jurisdiction, the Magistrates' Courts, and "Coroners' Courts," remained much the same, except that as regards the former, their jurisdiction and procedure were more clearly defined by Ordinance 13 of 1872, which latter Ordinance is now the principal one defining the jurisdiction and powers of Magistrates' Courts. The Coroners' Courts are now regulated by Ordinance 7 of 1884.

By Ordinance 5 of 1873, a further Criminal Court called the Court of Quarter Sessions was constituted. This Court, created originally by the Charter of 1807, continued in existence for very many years, but in point of practice ceased to exist, on the coming into force of Act XIII. of 1856, which authorized Magistrates to dispose of cases coming within their jurisdiction. It was again resuscitated by the aforesaid Ordinance 5 of 1873, and presided over by the Senior and Puisne Judges in Singapore and Penang respectively. The jurisdiction of this Court was more clearly defined by Ordinance 13 of 1872, but by Ordinance 17 of 1876, it was again abolished, and its jurisdiction [limited however to one-half of its powers of fine and imprisonment], conferred on two Magistrates.

In the same year, the practice and procedure of the Court of Oyer and Terminer was modified by Ordinance 6 of 1873, which also did away with the Grand Jury, a "Special," and "Common"

* "Ford, Theodore Thomas—Called to the Bar, Middle Temple, 26th Jan. 1866. Appointed Junior Puisne Judge, Supreme Court, Straits Settlements, March 1874; Presiding Judge of the Penang division of that Court until 17th July, 1874; Acting Judge of Penang from 17th July, 1874, to April, 1876, when he resigned and returned to England. Re-appointed Senior Puisne Judge, November 1876; Acting Chief-Justice from December, 1876, to February, 1878, and from 21st September, 1883, to January, 1885."—*Colonial Office List*, &c.

† Further changes subsequently took place amongst the Judges, but these are left out—see list of Recorders & Judges, *infra*.

SUPREME COURT. Jury being substituted instead, and prisoners tried by them after a formal commitment by the Magistrates.

SIDGENAVES, C. J.

Prior to this year, Appeals from the decisions of the Supreme Court, lay direct to the King or Queen in Council [Privy Council], but by the above Ordinance 5 of 1873, a Court of Appeal was constituted. It was however, abolished by effect of subsequent legislation[a], but again revived by Ordinance 5 of 1878. The practice and procedure of the Court of Appeal, is now governed by Ordinance 12 of 1879, as amended by Ordinance 3 of 1883.

PHILLIPS, J.

WOOD, J.

As before stated, there never were four Judges of the Supreme Court, present in the Colony at any one time, and Sir William Hackett, having been appointed Chief-Justice of Fiji, the aforesaid Ordinance 17 of 1876 was passed, by which the number of Judges was reduced to three, consisting of the Chief-Justice and two Puisne Judges as at present, and of the latter, Mr. Justice Phillips, a Judge of the Supreme Court of Natal, temporarily appointed to this Colony in June, 1877, being relieved by Mr. Justice Wood, in September following. [b]

By Ordinance 5 of 1878, the Supreme Court was further reconstituted, but the position and status of the Judges and Officers of the Court, were left by that Ordinance much the same, as they had been under Ordinance 5 of 1873 [modified by Ordinance 17 of 1876], and lately by Ordinance 15 of 1885, the Court has again been further reconstituted as consisting of four Puisne Judges. Following the Judicature Acts and Rules at home, the Equity and Plea Sides of the Court were abolished and the two branches of law fused, and English Rules of practice and procedure introduced by Ordinances 4 and 5 of 1878. These conjointly with Ordinance 8 of 1880, constitute the present guide to the practice and procedure of the Court in Civil cases. By Ordinance 3 of 1878, read in conjunction with Ordinance 6 of 1878, the Summary Side of the Court was abolished, and the Deputy Registrar and his staff became incorporated with the Registrar's Department.

[a] See *Fernon Allen v. Mccra Pullay & ors.* *infra*, p. 394.

[b] *Wood, Thomas Lett.*—Educated at Westminster School, and Trinity College, Cambridge; graduated M. A., 1846; practised as a special pleader from 1846 to 1851; was called to the bar of the Inner Temple, 1851; acted as Attorney-General of Vancouver Island, from 1864 to 1866, when that Colony was incorporated with British Columbia; afterwards as Solicitor-General of British Columbia, until the abolition of that office in 1867; was a member of the Legislative Council of British Columbia from 1866 to 1870; Chief-Justice, Bermuda, 1871; Judge of the Supreme Court, Straits Settlements, Aug. 1877." *Colonial Office List*, 1885.

I have now, I believe, in this preface, touched upon every important fact as could be gathered from the records, in connection with the administration of Justice in the Colony, from its foundation, as well as on the different changes and reforms introduced in the constitution of the Supreme Court,—and that of Courts of inferior jurisdiction,—although the latter incidentally,—at all stages. Statistics, it will be seen, have purposely been left out as having no connection with this preface, and as regards the different decisions of the learned Recorders and Judges, immediately affecting or concerning the Colony, or the different enactments passed during their time, it will also be observed, that no special allusion has been made in reference to them,—the latter fully appearing in the *Index to the Laws of the Straits Settlements*, [Part II., of which has scarcely been affected by subsequent legislation, since its appearance], and the former preferring to allow the work to speak for itself and thus shorten this already long notice.

That omissions and imperfections will be found, not only in this preface, especially considering the sometimes scanty and limited records travelled over,—as well as in the work itself, the *principal matter* here, is more than probable, and very likely more than I shall get the credit for, but it is needless for me to add, that I have spared neither time, nor trouble or expense, to make it as perfect as the limited time at my disposal would allow me, or the following up and tracing of the thousands of varied, complicated and scattered documents, all requiring repeated references and constant researches would permit. In the execution of this voluntary task, I have been prompted solely by an anxious desire to fulfil a duty,—which I felt all the more able to undertake by the opportunities I enjoyed in my official position, of a ready access to the records of the Court in Penang,—in supplying a want, as stated at the beginning of these pages, so long generally felt in this Colony, and thus save loss of time to many in their researches, it being well known, that cases and points of a similar nature, before argued and decided, have not unfrequently arisen and been argued over *de novo*, in ignorance of the fact of their having previously been dealt with in either one or other of the sister Settlements, or in the Settlement itself where the case or point arose afresh, instances of which will appear in this work. In my own experience, I have on endless occasions, heard Counsel,—and that sometimes in support of their own argument,—allude to certain “holdings of the Court” or of the Judge himself whom they were addressing, without being able to substantiate their *ipse dixit* in any manner or form whatever, in some instances even after the case cited,—if remembered,—had been hunted

for, thus placing all parties in an awkward position. [a] And here I may say, that another and *great* object of mine, in bringing out this work, has been to enable me on its publication, to connect it with a fresh edition of my Index to the Laws of this Colony, in inserting therein such Imperial Statutes as have been held applicable or otherwise to the Straits Settlements, as well as to refer therein, to the different constructions and rulings placed upon such Statutes, Acts and Ordinances as are still in force in the Colony, for it will at once be apparent, that in the matter of an Index, without a record of cases containing animadversions on the local laws, to refer to, especially when they are of such a mixed character as they are in this Colony, no such Index can be looked upon as complete or free from imperfections.

In regard to the Penang cases, I make bold to say, that *every one of those worth reporting, and as are to be found or can be made out amongst the Records in the Penang branch of the Supreme Court, from the date of the first Charter in 1808, to the present day, are included in this work.* Many cases of great importance and interest in days gone by,—some of which have been reproduced in the Collections before alluded to—are to be found amongst the records [although written judgments formed no part of the Records until the passing of Ordinance 5 of 1878, sec. 342],—but such cases having no bearing whatever at the present time, have been omitted.

The Singapore and Malacca cases, it will be found, are not so numerous as those of Penang, but here an explanation is necessary, for it must not be forgotten, that I have only had heretofore access to the records of the Penang branch of the Court, apart from the fact that it was only in 1855, that Singapore enjoyed the benefit of a residential Judge with jurisdiction over Malacca, the earlier decisions delivered in those Settlements being therefore few and far between, and only delivered by the Professional Judges while on Circuit. But again, such of the decisions delivered in those Settlements as appear in this work, have received equal attention,—and only those of any importance or bearing now-a-days have been reproduced, some of which have undergone considerable alteration, or in other words have been *completely recast*, having been originally but newspaper reports, containing

[a] See the following :

[BEFORE MR. BARON HUDDLESTONE.]

AN ANONYMOUS CASE.—Mr. Finlay, Q. C., in arguing some matters of law, referred to a case which, he said, had been decided lately, but had not been reported; so that he could not quote it in the usual way.—Mr. Baron Huddleston said that he recalled to his mind that years ago Mr. Wakefield, in one of the Chancery Courts, referred to what he described as an anonymous case; and the matter for the time passed off. When Mr. Bethell, however, came to reply, he said, “I have to inform your Lordship that that case has been over-ruled in the House of Lords.” Thereupon Mr. Wakefield, somewhat losing his temper, retorted, “There never was such a case.” In a similar way the case now adverted to might, perhaps, be called “An anonymous case,” and Mr. Reid might answer it by saying, “It has been over-ruled in the House of Lords.” *The [LONDON] Standard*, 4th July, 1885.

extraneous matters. A few of the early Singapore and Malacca cases, I have come across in my researches in the Penang Records having evidently been brought over by the Court on return from Circuit. For the others,—apart from those obtained by me from the Court records and other sources, I am greatly indebted to the courtesy of their Honors, Sir Thomas Sidgreaves, Chief-Justice, and Mr. Justice Wood, as well as to the Solicitor-General, Mr. Daniel Logan, and other members of the Bar, to whom I can only return my grateful thanks but without however feeling my labours sanctioned by their assistance and communications; especially Mr. Justice Wood, who not only placed all the Note-Books of the different Recorders and Judges as are still to be found in his office, at my disposal, but has also revised every manuscript of the judgments in his numerous cases published throughout this work, thereby enhancing its value, besides affording me as well, valuable suggestions which I have carried out. To His Honor the Chief Justice I am also greatly indebted for a similar favour, in going over all his cases, during his recent stay in Penang, especially at a time when he could ill-afford any leisure for such a purpose, and with his Honor's direct permission, this work is now most respectfully inscribed to him.

But to no one, am I under more obligation, than to Mr. R. G. Van Someren, Advocate and Solicitor of the Supreme Court. Not being a professional myself, and consequently for want of self-confidence, I could not trust to my own experience, and greatly through the assistance I have received from him, have I been enabled thus to bring this work to, what I hope will prove to be, a successful issue. The manuscript of every case appearing in this work, has been gone over by him, and only after consultation with him, is every case herein appearing, published. To that gentleman therefore, I take this opportunity of offering my most grateful acknowledgments, for the work passing under the eye of one so familiar with our laws and procedure, enables me to present it with some degree of confidence.

Owing to the great bulk of this work, and the number and varied nature of the cases, an analytical classification has been found impossible, and I have therefore deemed it advisable to publish the cases separately. Thus, this Volume consists of Cases purely of a Civil nature, Volume II., 1o. of *Criminal Rulings*; 2o. *Admiralty*; 3o. *Bankruptcy*; 4o. *Ecclesiastical*, and 5o. *Habeas Corpus* Cases; and Volume III., entirely of Appeals from the decisions of Magistrates, all with a complete and searching Index, and a Table of the names of the Cases cited and reported.

Decisions of the Privy Council on local cases appealed against, and those of the full Court of Appeal in similar cases, follow such cases in regular order, including decisions of the Court of Appeal in 1885 in cases originally decided in 1884 or earlier years.

A List of the cases cited in this work, as well as a list of the cases reported and of the Recorders and Judges of the Colony from the date of the first Charter, with the dates of their assump-

tion and relinquishment of duties, and a List of the Agents, General and Special, Solicitors and Advocates of the Court from its earliest days are also herein given.

With this notice, and general outline of the nature and contents of the work, I beg to submit it to the candour of the public, the bar, and officials alike, for whose service it is intended, and I do so without presumptuous confidence, but at the same time without affecting to conceal my expectation that the labour I have employed in preparing these Volumes, will be found by those who use them, to shorten their own toil in searching for authorities in point upon most of the questions coming before our Supreme Court and Courts of Inferior Jurisdiction, as well as tracing, by means of this Preface,—*its immediate purport*,—the origin of some of the early as well as modern institutions of the Court, a matter of no small moment in regard to some cases at times [a], and I trust my efforts in that direction will not prove to have been unavailing.

In conclusion, it is but proper that I should observe, that the manuscript of this work was not only completed, but more than two-thirds of it had gone through the press when I was transferred to this Settlement. The work was therefore too far advanced to enable me, for present purposes without greatly delaying its publication, to go over the records of the Court in its division here, where doubtless most valuable information is to be obtained from the records.

J. W. N. K.

MALACCA, S. S. }
30th November, 1885. }

[a.] By way of illustration, see *Reg. v. Willans*, and *Reg. v. Kuck Sin Loi*, Magistrates' Appeals, Vol. III. of these Reports.

*List of Recorders and Judges of the Straits Settlements, from the first Charter granted to Prince of Wales' Island [PENANG.] **

1ST. CHARTER.

COURT OF JUDICATURE OF PRINCE OF WALES' ISLAND.

[*Letters Patent*, 25th March, 1807.]

NAME OF RECORDERS.	DATE OF ASSUMPTION OF OFFICE.	DATE LAST SAT.
1. SIR EDMOND STANLEY	3rd June 1808 ...	8th Nov. 1816 [<i>a.</i>]
2. SIR GEORGE ANDREW COOPER ...	4th Feb. 1817 ...	22nd „ 1817 [<i>b.</i>]
3. SIR RALPH RICE	25th Nov. 1817 ...	25th Aug. 1824 [<i>c.</i>]
4. SIR FRANCIS SOUPER BAYLEY ...	26th Aug. 1824 ...	7th Oct. 1824 [<i>d.</i>]

[*a.*] Resigned on the 14th November, on being appointed a Judge of the Supreme Court at Madras, where he afterwards became Chief-Justice.

[*b.*] Promoted Chief-Justice of Bombay.

[*c.*] Transferred to Bombay as a Puisne-Judge.

[*d.*] This Recorder, only sat 9 times, and died in Penang on 20th October, 1824.

2ND. CHARTER.

COURT OF JUDICATURE OF PRINCE OF WALES' ISLAND, SINGAPORE AND MALACCA.

[*Letters Patent*, 27th November, 1826.]

NAME OF RECORDERS.	DATE OF ASSUMPTION OF OFFICE.	DATE LAST SAT.
1. SIR JOHN THOMAS CLARIDGE ...	9th Aug. 1827	24th Aug. 1829 [<i>a.</i>]
2. SIR BENJAMIN HEATH MALKIN ...	13th Feb. 1833	29th June 1835 [<i>b.</i>]
3. SIR EDWARD JOHN GAMBIER ...	29th June 1835	28th Sept. 1836 [<i>c.</i>]
4. SIR WILLIAM NORRIS	29th Sept. 1836	8th May 1847 [<i>d.</i>]
5. SIR CHRISTOPHER RAWLINSON ...	14th Aug. 1847	14th Feb. 1850 [<i>e.</i>]
6. SIR WILLIAM JEFFCOTT	14th Feb. 1850	6th October 1855 [<i>f.</i>]

[*a.*] Recalled from office—see *Preface*, &c., p. lxxvii.

[*b.*] Transferred to Calcutta as Chief-Justice.

[*c.*] Appointed 2nd Puisne-Judge of Madras, and in 1842 became *Chief-Justice* there. [*First Report—Indian Territories*, 1853, p. 243.]

[*d.*] Retired on pension.

[*e.*] Promoted Chief-Justice of Madras, in the room of Sir Ed. Gambier, retired.

[*f.*] Died in Penang, 22nd October, 1855.

* *The information given in these lists is taken from Court Records.*

List of Recorders and Judges of the Straits Settlements, from the first Charter granted to Prince of Wales' Island, [PENANG] continued.

3RD. CHARTER. [a.]

COURT OF JUDICATURE OF PRINCE OF WALES' ISLAND, SINGAPORE AND MALACCA.

Letters Patent, 12th August, 1855.

NAME OF RECORDERS.	DATE OF ASSUMPTION OF OFFICE.	DATE LAST SAT.
1. SIR RICHARD BOLTON McCausland ...	22nd March 1856	25th Aug. 1866 [b.]
2. SIR PETER BENSON MAXWELL ...	4th April „	... .. [c.]
3. SIR WILLIAM HACKETT	25th Aug. „	... .. [d.]

[a.] By this Charter, 2 Recorders were appointed. Sir Richard McCausland to Singapore, and Sir Benson Maxwell to Prince of Wales' Island—*vide* Preface, &c., p. xciv.

[b.] Retired on pension.

[c.] Succeeded Sir Richard McCausland as Recorder of Singapore, and on the transfer, became Chief-Justice of the Straits Settlements—*vide* Preface, &c., p. cii.

[d.] Succeeded Sir Benson Maxwell as Recorder of Prince of Wales' Island, and on the transfer, became Judge of Penang—*vide* Preface, &c., p. cii.

THE SUPREME COURT OF THE STRAITS SETTLEMENTS. [a.]

[Constituted under Ordinance 5 of 1868, &c.]

NAME OF JUDGES.	DATE OF ASSUMPTION OF OFFICE.	DATE OF RELINQUISHMENT OF DUTIES.
1. SIR PETER BENSON MAXWELL, C.J. ...	see 3rd Charter above & note [c.] thereto.	Retired, 26th July, 1871.
2. SIR WILLIAM HACKETT.	do. do. [d.]	March, 1875* [b.]
3. SIR THOMAS SIDGREAVES, C. J. ...	5th Jan. 1872.	... .. [c.]
4. FRANCIS SNOWDEN... ..	13th Feb. 1874.	March 1874* [d.]
5. GEORGE PHILLIPPO	13th „ „	August 1876* [e.]
6. THEODORE THOMAS FORD	15th April „	... .. [f.]
7. HENRY LUSHINGTON PHILLIPS, C.M.G.	30th June, 1877.	17th Sept. 1877 [g.]
8. THOMAS LETT WOOD	10th Sept. „	... .. [h.]

[a.] Acting appointments not included in this list.

* Exact date not traceable in Penang Court Records.

[b.] Appointed Chief-Justice of Fiji—had acted as Chief-Justice of the Colony.

[c.] *Vide* Preface, &c., p. civ.

[d.] Appointed Puisne-Judge of Hong-Kong.

[e.] Transferred to Hong-Kong as Attorney-General.

[f.] *Vide* Preface, &c., p. cv.

[g.] Was only a temporary Judge, and returned to Natal—*vide* Preface, &c., p. cvi.

[h.] *Vide* Preface, &c., p. cvi.

*List of Law Agents—Special and General—and Advocates and Attornies,
admitted to practice in the Straits Settlements, from the first Charter
to Prince of Wales' Island, [PENANG.] [a.]*

1st CHARTER [b.]

[25th March, 1807.]

NAME.	DATE OF ADMISSION.	SPECIAL OR GENERAL AGENT.	REMARKS.
JOHN HEWITT ...	4th Nov. 1808	General	Attorney of the Court of King's Bench. [c.]
THOMAS KEKEWICH ...	18th Oct. 1809	Special	Disbarred 22nd June, 1810, and re-instated, 30th August of same year "on petitioning for and obtaining a full pardon"—was for some time Clerk to Sir Edmond Stanley, R., and Registrar of the Court. [d.]
CUTHBERT FENWICK ...	23rd Oct. 1809	Do.	[See Preface, &c., p. xlvii.]
JOHN GRANT WILLSON ...	24th Feb. 1810	Do.	... ..
THOMAS STACKHOUSE ...	8th Feb. 1817	General	Attorney of the Court of King's Bench. [e.]
THOS. CORBET GRIMWOOD	4th Aug. 1817	Special	The date here given only relates to that on which this Agent was disbarred, the date of his admission not being traceable. [f.]
NATHANIEL BACON ...	20th Aug. 1817	General	Had previously acted as Sub-Sheriff and also as Registrar—practised also under 2nd Charter; date of admission thereunder: 8th Oct., 1827.
ROBERT TERRANEAU ...	20th Aug. 1817	Do.	was "Secretary" to Sir Ralph Rice, R., in 1821.

[a.] No Roll of Agents under the first Charter exists, and the information herein given, is obtained from searches in Court Records.

[b.] See Preface, &c., p. xlii.

[c.] Only practised up to the 26th January, 1809, when he was appointed Registrar.

[d.] See *In the Goods of Thomas Kekewich, deceased*, Ecclesiastical Cases, Vol. II. of these Reports.

[e.] Came out with and as "Secretary" to Sir George Cooper, R., and practised but a very short time after admission, subsequently leaving with the same Recorder for India.

[f.] Disbarred "upon the application of Mr. Duff" [the Registrar] for "improper conduct in Court on former occasions, and particularly for having given false and prevaricating evidence in this cause"—*Shaik Mahomed Allie v. Mahomed Lebbey*—Appeal Case, 4th August, 1817. [not reported.]

*List of Law Agents—Special and General,—and Advocates and Attornies,
Prince of Wales' Island,
2ND CHAR
[27th Novem*

NAME.	DATE OF ADMISSION.	SETTLEMENT WHEREIN ADMITTED.†	
		PRINCE OF WALES' ISLAND.	SINGAPORE.
CHARLES TREEBECK	4th October 1827	P. of W. I.	...
WILLIAM CAUNTER	15th March 1828	Do.	...
VETRUVIUS LAWES	4th August 1829	Do.	...
WILLIAM BALHETCHET †	24th December 1832	Do.	...
WILLIAM NAPIER	18th February 1833	...	Singapore
JAMES FAIRLIE CARNEGy	9th March 1833	P. of W. I.	...
THOMAS RIDER BALDWIN	9th November 1837	Do.	...
JAMES RICHARDSON LOGAN	25th January 1842	Do.	...
ABRAHAM LOGAN	29th April 1842	Do.	...
HENRY WILLIAM LEWIS	27th November 1843	Do.	...
ROBERT RUTHERFURD... ..	5th September 1844	Do.	...
*CHRISTIAN BAUMGARTEN	12th February 1846	...	Singapore
JOHN PHILIP DE MURAT	6th December 1848	P. of W. I.	...
JOHN CADMAN HEAP... ..	28th April 1849	...	Singapore
GEORGE MATHEW KENITZ	15th June 1849	P. of W. I.	...
ROBERT CARR WOODS, Sen.	21st September 1849	...	Singapore
JOHN EDWARD BRANSON	6th March 1852	P. of W. I.	...
ALEXANDER MUIRHEAD AITKEN	4th August 1852	...	Singapore

† List of Agents admitted in Singapore, furnished by the Registrar of that Settlement. In Malacca no roll of agents exists, if any ever admitted in the Settlement.

‡ See Preface, &c., p. lxxxv.

* This asterisk refers to those still in practice, irrespective of the Settlement wherein practising, members of the Bar being entitled to practice in any of the Settlements.

admitted to practice in the Straits Settlements, from the first Charter to [PENANG] continued.—

TER.

ber, 1826.]

SPECIAL § OR GENERAL.	REMARKS. [a.]
General	Disbarred, 20th August, 1829—previously an Attorney of the Supreme Court of Calcutta. [b.]
Do.	Previously clerk to Sir John Claridge, and in April 1823, appointed Law Agent to the E. I. Co. [c.]
Do.	Attorney of H. M. Courts at Westminster, also an Attorney of the Supreme Court of Calcutta.
Do.	Previously a Merchant—was for some time Law Agent to the E. I. Co., a Government Official, and a Law Agent alternately.
Do.	Previously a Merchant.
Do.	Do.
Do.	Attorney of H. M. Courts at Westminster, had practised as an Attorney at Madras.
Special Do.	} Had been Law Students at the University of Edinburgh.
Do.	Disbarred in 1844, on account of pecuniary difficulties, and on being imprisoned for debt.
Do.	Previously articled clerk in “Bells & Rutherford,” Writers to H. M. Signet, Edinburgh, and was an Attorney of the Supreme Court of Madras.
Do.	Had previously practised as a Special Agent and a Notary in Penang.
Do.	Previously a Merchant.
Do.	Admitted an Attorney of H. M. Courts at Westminster on 16th June 1843.
Do.	Was a Proctor of the “District Courts” of Ceylon.
Do.	Afterwards called to the Bar at Gray’s Inn, 6th June 1863.
Do.	Was an Attorney of the Supreme Court of Madras.
Do.	Afterwards called to the Bar at the Middle Temple, Hilary Term, 1864.

[a.] Information supplemented in this column obtained from Court Records.

[b.] See *Ishmael Lazamana v. East India Co.*, and *In re Trebeck*, p. 4.

[c.] See *Caunter v. East India Co.*, p. 12, and *Preface, &c.*, p. lxxxv.

§ See *Preface, &c.*, p. xlii.

*List of Law Agents—Special and General—and Advocates and Attornies,
Prince of Wales' Island,*

3RD CHAR
[12th An

NAME.	DATE OF ADMISSION.	SETTLEMENT WHEREIN ADMITTED.	
		PRINCE OF WALES' ISLAND.	SINGAPORE.
JOSEPH CORNISH HELMORE ...	21st October 1856	...	Singapore
FRANCISCO EVARISTO PEREIRA ...	14th February 1857	...	Do.
JOHN SIMONS ATCHISON	23rd May 1859	...	Do.
ALEXANDER ALLAN	23rd February 1860	P. of W. I.	...
*BERNARD RODYK	8th May 1860	Do.	...
DAVID AITKEN	13th March 1860	Do.	...
THOMAS BRADDELL, C.M.G., [1882] † ...	4th February 1861	Do.	...
*JAMES GUTHRIE DAVIDSON ...	1st July 1861	...	Singapore
WILLIAM GILBERT CAMPION ...	12th November 1861	P. of W. I.	...
ALEXANDER BAUMGARTEN	26th April 1862	...	Singapore
EDWARD AUGUSTUS EDGERTON ...	24th October 1862	...	Do.
HENRY JEFFERD TARRANT	8th December 1862	...	Do.
ALEXANDER AUGUSTUS BAUMGARTEN	28th September 1863	...	Do.
ROBERT CARR WOODS, Jr.,	28th September 1863	...	Do.
*EDWIN KOEK	23rd December 1864	...	Do.
*DANIEL LOGAN †	4th April 1864	P. of W. I.	...
HORATIO AUGUSTUS BAUMGARTEN...	27th June 1864	...	Singapore
PETER BENSON MAXWELL, Jr., ...	7th March 1866	P. of W. I.	...
HON. CHARLES BUSHE PLUNKET ...	28th September 1866	Do.	...
DUNCAN CLERK PRESGRAVE... ..	3rd July 1867	Do.	...
CHARLES WILLIAMSON RODYK ...	8th January 1868	Do.	...
HON. WILLIAM EDWARD MAXWELL, C. M. G., [1885.]	27th February 1868	Do.	...

[a.] See Preface, &c., page xliii.

† See Preface, &c., p. lxxxv.

* This asterisk refers to those still in practice.

admitted to practice in the Straits Settlements from the first Charter to
 [PENANG.] *continued :—*

TER [a.]

gust, 1855.]

REMARKS. [b.]

Attorney of H. M. Courts at Westminster, 24th November 1855.

Of Gray's Inn, 9th June 1865.

Admitted Easter Term, 1855, as Attorney of H. M. Courts at Westminster.

A Scotch Solicitor—called 25th November, 1859.

Was Senior Sworn Clerk to the Registrar, and admitted after examination.

Was Clerk to Sir Benson Maxwell.

Called at Gray's Inn, 10th June 1859—became Attorney-General of the Colony in 1867 [re-
 [tired.]

An Agent and Solicitor of the Supreme Court of Scotland.

Previously an Attorney of the Supreme Court of Bengal.

Admitted locally.

Was an Attorney of the Supreme Court of New York—disbarred in Penang on the 13th
 October, 1865, for mal-practices.

Of the Middle Temple, 11th June 1862.

Admitted locally.

Afterwards called at Gray's Inn, 9th June 1865.

Passed locally.

Of the Middle Temple—called 17th November 1862, was Crown Prosecutor in 1864, and
 became Solicitor-General, P., on the transfer in 1867.

Admitted locally.

Was Senior Sworn Clerk to the Registrar, and acting Assistant Resident Councillor, Penang.

Of King's Inns, Ireland—called 16th February 1866—was Registrar of the Court in Penang.

Was Secretary to Municipal Commissioners—admitted after examination.

Passed locally by examination.

Admitted after examination—was Senior Sworn Clerk to the Registrar and Chief Clerk
 of the Insolvent Court—now Commissioner of Lands, S. S., and M. L. C., was called
 to the Bar at the Inner Temple, 26th January 1881.

[b.] Information in this column obtained from Court Records.

*List of Law Agents—Special and General,—and Advocates and Attornies,
of Wales' Island,*

THE SUPREME COURT OF

[Ordinance 5 of

NAME.	DATE OF ADMISSION.	SETTLEMENT WHEREIN ADMITTED.	
		PRINCE OF WALES' ISLAND.	SINGAPORE.
* ISAAC SWINBURNE BOND, M. A. ...	31st July 1869	P. of W. I.	...
* JONAS DANIEL VAUGHAN	1st September 1869	...	Singapore
DOUGLAS COOPER	27th September 1869	...	Do.
* CH. KEITH ELPHINSTONE WOODS ...	7th January 1870	P. of W. I.	...
CHARLES EUGENE VELGE	12th October 1871	...	Singapore
* FREDERICK JOHN CAUNTEE ROSS ...	22nd December 1871	P. of W. I.	...
FRANCIS WORGE DUKE	11th November 1872	P. of W. I.	...
* FELIX HENRY GOTTLIEB	24th February 1873	...	Singapore
LEWIS HERBERT WOODS	4th March 1873	...	Do.
* ROBERT GARLING VAN SOMEREN ...	1st May 1873	P. of W. I.	...
* ALEXANDER LEATHES DONALDSON	9th June 1873	...	Singapore
* EDWARD FAITHFUL THOMAS ...	24th November 1873	...	Do.
* JOHN BURKINSHAW	6th November 1874	...	Do.
ARTHUR EDWARD CLARKE	4th June 1875	...	Do.
CHAS. JAMES TENNANT DUNLOP ...	14th June 1875	...	Do.
HARRY CLEVELAND VAUGHAN ...	31st August 1875	...	Do.
SYDNEY STRONG	14th October 1875	...	Do.
* GREGORY ANTHONY	18th December 1876	P. of W. I.	...

[a.] By Ordinance 5 of 1878, the members of the Bar are styled "Advocates and Solicitors."

* This asterisk refers to those still in practice.

admitted to practice in the Straits Settlements, from the first Charter to Prince
[PENANG] continued.

THE STRAITS SETTLEMENTS.

1868, &c.] [a.]

REMARKS. [b.]

Of the Inner Temple, called 26th January, 1867. Is a Member of the Legislative Council since 21st August, 1877.

Of the Middle Temple—7th June 1869.

Attorney of H. M. Courts at Westminster—admitted Michaelmas Term, 1853.

Passed locally.

Middle Temple, 17th November, 1870—is Registrar of the Court in Singapore.

Of the Middle Temple, 1st May, 1871.

Of Lincoln's Inn, 7th June, 1858.

Middle Temple, 17th November, 1871. Was previously a Government Servant—retired as "acting senior Magistrate of Penang" in 1881.

Admitted locally.

Passed locally.

Attorney of H. M. Courts at Westminster—admitted 31st January, 1865.

Do. Do. —admitted 24th November, 1860.

Do. Do. —admitted 25th November, 1863.

Of the Inner Temple, 26th January, 1871.

Of Lincoln's Inn, 17th November, 1874.

Of Lincoln's Inn, 7th June, 1875.

Of Gray's Inn, 10th June, 1867.

Passed locally.

[b.] Information given in this column, supplemented from Court Records.

*List of Law Agents—Special and General—and Advocates and Attornies,
Prince of Wales' Island,*

THE SUPREME COURT OF

[Admissions under Ordinance 5

NAME.	DATE OF ADMISSION.	SETTLEMENT WHEREIN ADMITTED.	
		PRINCE OF WALES' ISLAND.	SINGAPORE.
* EDWARD WILLIAM PRESGRAVE ...	15th November 1878	P. of W. I.	...
* JOAQUIM PARSICK JOAQUIM ...	22nd " "	...	Singapore
* WALTER CLUTTON ...	23rd June 1879	...	Do.
* EDWARD JAMES NANSON, B. A. ...	3rd July 1879	...	Do.
* THOMAS HERBERT KERSHAW, B.A. ...	30th Sept. 1879	P. of W. I.	...
* THOMAS DE M. L. BRADDELL ...	5th January 1880	...	Singapore
* CHARLES BURTON BUCKLEY ...	19th April 1880	...	Do.
* ARTHUR CHRISTOPHER CAPEL ...	19th Nov. 1880	P. of W. I.	...
* ALFRED HENRY DREW, M. A. ...	24th October 1881	...	Singapore
JOHN AUGUSTUS HARWOOD ...	24th April 1882	...	Do.
* ROBERT W. G. L. BRADDELL ...	22nd January 1883	...	Do.
* REGINALD A. P. HOGAN ...	19th February 1883	P. of W. I.	...
* CHARLES GRANT LOGAN ...	27th April 1883	Do.	...
* GEORGE H. S. GOTTLIEB ...	25th June 1883	Do.	...
* GERALD OSMOND VAUGHAN ...	7th September 1883	...	Singapore
* HON. JOHN WINFIELD BONSER, M. A.	12th November 1883	...	Do.
WM. CHARLES MACTAGGART ...	4th February 1884	...	Do.

* This asterisk refers to those members of the Bar still in practice.

Members of the Home Bar in the Colony,

NAME.	WHEN CALLED, &c.
WOOD, HIS HON. THOS. LETT ...	Of the Inner Temple, 13th June, 1851
SIDGREAVES, HIS HON. SIR THOMAS, KNT.	„ Middle Temple, 6th June, 1857
FORD, HIS HON. THEODORE THOMAS ...	„ do. 26th January 1866
SKINNER, THE HON'BLE ALLAN MACLEAN	Of Lincoln's Inn, 11th June 1867
FAWKES, ARCHIBALD WALTER ...	Of the Inner Temple, 27th January 1879

admitted to practice in the Straits Settlements, from the first Charter to [PENANG] continued:—

THE STRAITS SETTLEMENTS.

of 1868, &c., continued.]

REMARKS.

Of the Middle Temple, 3rd July, 1878.

Do. Do. , 15th May, 1878.

Solicitor of the Supreme Court of Judicature in England—admitted 11th April, 1876.

Do. Do. 16th November, 1877.

Of the Inner Temple, 25th April, 1877.

Do. Do. , 25th June, 1879.

Admitted locally after examination.

Of Lincoln's Inn—21st April, 1880.

Solicitor of the Supreme Court of Judicature in England, 2nd May, 1881.

Of the Middle Temple, 6th June, 1871—is Registrar of the Court in Penang.

Of the Inner Temple, 9th May, 1882.

Of the Middle Temple, 21st June, 1882.

Do. Do. , 26th Jan. 1883.

Do. Do. , 26th Jan. 1883.

do. do. , 6th June 1883.

Of Lincoln's Inn, 18th November, 1872,—is Her Majesty's Attorney-General for the Straits Settlements.

Of the Inner Temple, 26th Jan. 1883.

not included in above List.

REMARKS.

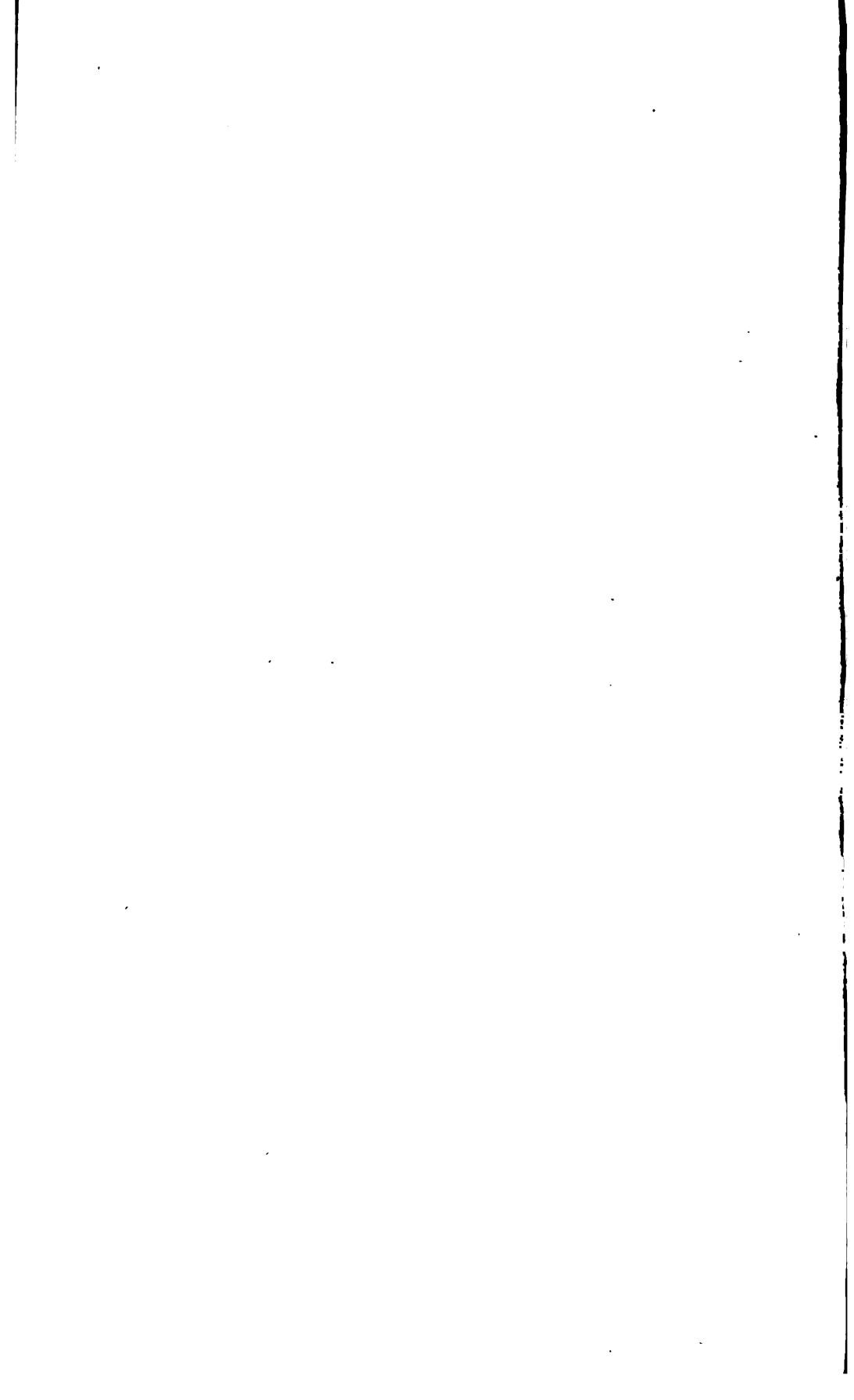
Puisne-Judge, S.S., see List of Recorders, &c., *Infrà*.

Chief-Justice, S.S., ... do. ...

Puisne-Judge, S.S., ... do. ...

Colonial Treasurer & Member of Executive and Legislative Councils, S. S.

Is Registrar of the S. Court, &c., in Malacca.



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ADDENDA ET CORRIGENDA.

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- iv. Line 23 ; after "accused"—insert an asterisk and at the bottom of the page add the following foot-note : *Vide Jour. Ind. Arch.*, Vol. 4, 1850, p. 643, and do., Vol. 5, 1851, p. 255.
- vi. marginal entry—for "1896" read "1796."
- vi. foot-note ; last line but one—for "24t4" read "24th."
- xvii. last line ; for "in the house of *One* witness" read "in the presence of *One* witness."
- xxvi. foot-note ; 4th line—for "departed his life" read "departed this life."
- lii. last line ; for "those Reports" read "these Reports."
- lxii. line 10 ; for "Compay" read "Company."
- lxiv. first foot-note ; line 2—for "will be formed" read "will be found."
- lxix. first line ; for "in the latter's time" read "in his time."
- lxxvi. line 22 ; for "doubted of the legality" read "doubted the legality."
- c. " 31 ; for "is that one of" read "is that of one."
- cix. " 32 ; for "grateful" read "grateful."
- 1 " 5 ; [*Kamoo v. Bassett*]—in opening statement : after the words "pleaded not guilty" add "and justified his acts as Commanding Officer of the Regiment."
- 3 " 18 ; [*Kamoo v. Bassett*] after the words "former case against the defendant" add foot-note "*Shaik Dassce v. J. J. Bassett*, 20th September 1808—action for the recovery "of damages for severe ill-treatment, &c.,—*not reported*."
- 5 " 6 ; for "pre-uniary" read "pecuniary."
- 8 " 29, 30, 33 ; for "Patullo" read "Pattullo."
- 11 " 16 ; for "practise" read "practice."
- 11 foot-note [a.]—for "Sir Thomas Claridge" read "Sir John Claridge."
- 12 line 41 ; for "paintiff" read "plaintiff."
- 12 " 46 ; " "on" read "or."
- 13 " 40 ; " "continance" read "continuance."
- 33 " 6 ; " "C. 23" read "C. 3."
- 38 " 1 ; " "appears" read "appear."
- 38 " 5 ; " "judgement" read "judgment."
- 41 " 34 ; " "moths" read "months."
- 51 marginal note—bottom of the page—for "1882" read "1842."
- 63 line 41 ; [*Tan Kee v. Hong Keat*]—for "It appear" read "It appeared."
- 75 " 12 ; head-note in *Brown v. Municipal Commissioners*—for "means" read "mean."
- 103 " 49 ; *dele* inverted commas.
- 119 " 5 ; head-note in *Ibbetson v. Brown*, for "is" read "are."
- 133 last line but one—for "bon" read "bond."
- 216 marginal note—*Choa Choon Neoh v. Spottiswoode*—for "January 19" read "February 10."
- 222 foot-note [b.]—for "178" read "1878."
- 224 line 19 ; for "demonstrates" read "demonstrate."
- 247 " 11 ; for "Teher" read "There."
- 308 foot-note [a.]—for "1844" read "1884."
- 385 *Shaik Madar v. Jaharrah*—insert year "1875" under "March 5."
- 509 line 3 ; head-note—*Gottlieb v. Leicester*—for "had had" read "has had."
- 512 " 26 ; *Golam Kader v. Shagapah Chetty*—for "in the point" read "on the point."
- 587 " 14 ; head-note—*Vermont v. Municipal Commissioners*—for "suppositious" read "supposititious."
- 600 last line, but one—for "Prvy" read "Privy."
- 606 last line—for "unture" read "untrue."
- 618 line 2 ; opening statement—*Wyndham v. Hansen*—for "emplyment" read "employment."
- 633 marginal note—for "Food" read "Ford."
- 656 3rd column ; "parchaser" read "purchaser," and 4th column ; for "purchaser" read "purchase."
- 685 line 15, 33 ; 2nd column of Index—heading—*Caveat Emptor*. No. 2—for "implied warrant" read "implied warranty."
- 694 " 35 ; for "devided" read "divided."

NOTE.—For correct quotation and spelling of "cases cited" in this work, vide "*Table of Cases Cited*."—suprà.

ABBREVIATIONS.

"Ag."	stands for	"Acting."
"C. J."	"	"Chief Justice."
"E. I Co	"	"East India Company."
"G. N."	"	"Government Notice or Notification."
"J."	"	"Judge."
"J. & M."	"	"Judge and Magistrate."
"Jour. Ind. Arch."	"	"Journal of the Indian Archipelago."
"Jun." or "jr."	"	"Junior."
"M."	"	"Malacca."
"P."	"	"Penang."
"R."	"	"Recorder."
"R. I. L. Co."	"	"Report of the Indian Law Commissioners."
"Seur." or "Sr."	"	"Senior."
"S."	"	"Singapore"
"S. S."	"	"Straits Settlements."

CASES

HEARD AND DETERMINED

IN

HER MAJESTY'S SUPREME COURT

OF THE

STRAITS SETTLEMENTS,

1808—1884.

VOLUME I.

[CIVIL CASES.]

KAMOO v. THOMAS TURNER BASSETT.

A "Khidmiggur," or table-servant, to a Military officer stationed at the Settlement in time of peace, is not a "camp-follower," and is not subject to military law, nor liable to be tried by Court-martial.

No man is subject to military jurisdiction, but an officer, soldier, or sepoy, or some one connected with the army; nor is any offence cognizable by the military tribunal, or within its jurisdiction, but some act which is a breach of military duty or a neglect of military discipline: and no military person is liable to punishment for breach of military law or discipline, except in consequence of a trial, and the sentence of a Court-martial.

By the Charter of 1807, not only was the English Criminal law extended to this Colony, but civil injuries are to be redressed according to English law; and that even as regards offences or wrongs, committed or done, before the Charter. [a]

PENANG.

STANLEY, R.,
1808.

November 25.

THIS was an action of assault, battery and false imprisonment, in which the plaintiff complained of an assault, on the 13th of November, 1807, and false imprisonment from that period to the 28th January, 1808; and laid his damages at 600 dollars.

The defendant pleaded not guilty.

It appeared that the plaintiff, who was a native of Bengal, engaged himself at Calcutta, in June, 1806, to serve the defendant, who was Lieutenant-Colonel of the 20th Regiment, Bengal Native Infantry, as a "Khidmiggur," or table-servant, in Penang, at \$6 per month; "that in the course of that year, the plaintiff received very severe treatment from the defendant, "being at various times inflicted punishments by no means proportionate to any offence he could have committed, sometimes "receiving 20 and at other times 30 and 40 lashes, besides being "ordered into confinement."

On the 20th July, 1807, the plaintiff received 20 strokes with a rattan by order of the defendant, whereupon he complained to

[a] See REG. v. WILLANS, Magistrates' Appeals, Vol. III. of these Reports.

See also 2 K (Hc) p 8

STANLEY, R. the Police Magistrate, who at that time, exercised jurisdiction
 1908. in the island, under certain Regulations of the Governor-in-
KAMOO Council: "the Magistrate having informed Colonel Bassett of the
 v. "circumstance, the latter despatched a sepoy who seized the
BASSETT. "plaintiff, and brought him before the defendant, who
 "then ordered the plaintiff into confinement, without any trial
 "or crime being alleged against him, having previously inflicted
 "on him twenty stripes more with a rattan; that on the said 13th
 "November, 1807, the defendant ordered the plaintiff to be
 "brought into the Grand Parade, and there without any trial by
 "Court-Martial or otherwise, and in the presence of the whole
 "Battalion of Sepoys and Officers, after two sepoys had received
 "corporal punishment, under the sentence of a Court-Martial,
 "ordered the plaintiff to be tied up to a stake, and to receive 100
 "lashes with a cat-of-nine-tails," on the plea that plaintiff had
 "traded his character, by representing him as a bad master;
 "that having inflicted this cruel punishment, the plaintiff was
 "ordered into confinement in the Sepoy Guard, where he remained
 "for the further space of two months and a half, and afterwards
 "released from defendant's service [a]."

The parties appeared in person.

Cur. Adv. Vult.

December 7. *Stanley R.* I am clearly of opinion that the plaintiff is entitled to a verdict. This is an act which cannot be justified by the Mutiny Act of 27 Geo. II., or the articles of war framed under it; nor yet by the native articles of war, which had been selected in the year 1796, under the directions of Sir R. Abercrombie, when he was Commander-in-Chief, and promulgated by the Governor-General in Council, and which I believe, is the code by which the native troops are considered to be now governed. The defendant's acts were contrary to the usage of the army, and are repugnant to every principle of justice. No man is subject to military jurisdiction, but an officer, soldier or sepoy; nor is any offence cognizable by the military tribunal, or within its jurisdiction, but some act which is a *breach of military duty*, or a *neglect of military discipline* [b], and in no case can any person be subject to military punishment, except in consequence of a trial, and the sentence of a Court-martial. The defendant, however, has undertaken to be accuser and judge in his own cause, and inflicted military punishment, expressly contrary to the articles of war. It is true this was done before the Charter of Justice had been promulgated here, and before this Court had been established; but yet the Charter extends in terms to civil injuries which have been sustained, as well as to crimes that have been committed before the Charter; and as punishments have been, in certain cases, inflicted for the latter, I am unable to say that civil remedies should not also be had for the former, although under certain limitations, where they were lately done, before the Charter was proclaimed. The

[a] The pleadings herein shew that the old English practice was adopted, and that the plaintiff gave as "pledges to prosecute—John Doe and Richard Roe."

[b] See *In re Madden, Habeas Corpus* cases, Vol. II. of these Reports. *HP*

object of the Charter is to protect the Natives from oppression and injustice, and I shall always consider it my duty, to guard their persons, liberties and properties, with the same watchful care as I should the best European or British Subjects; but as the case happened before the Charter, and the law might not be so generally known, I shall not give as large damages in this case, as I should have done for a similar injury, if it had been recently committed, or since the establishment and introduction of the British Laws. In apportioning damages, I must also take into consideration, all the circumstances of mitigation as well as aggravation, the state of society here, and the description of persons, of whom many of the inferior classes are formed, and also the pecuniary circumstances of the defendant, which are represented as being far from affluent. Moderate damages would, I think, have all the effect of making the law known, and of preventing similar practices in future, but if such outrage upon the laws should ever occur again, I shall think it my duty to give very large damages indeed. In a former case against the defendant of a trivial nature compared to the present, I assessed the damages at 20 dollars; in the present, I shall give 150 dollars, which, though small, I trust will have the effect of preventing the repetition of such practices as these in future. The plaintiff, I am clear, cannot be considered under the description of a camp-follower, as the army was in cantonment in time of peace; and the offence, if any, was only cognizable by the Civil Magistrate, and the Civil Judicature which then existed here—but, even if he is to be considered as falling under that description of persons, who were subject to Military Law, he should have been tried by a Court-martial, before such a public punishment was inflicted upon him; and the act itself having been ordered by an officer who was acting as judge in his own cause, for a supposed injury done to himself, was most unjustifiable.

Verdict for plaintiff, \$150 with costs.

EAST INDIA COMPANY v. D. BROWN.

A person in possession of land, is liable to the Crown for quit rent accrued during the time of his predecessors in title.

The possession of receipts for quit rent for a later period than that claimed, raises a presumption in law that the previous rents had been satisfied, which presumption, unless rebutted, is sufficient to debar the Crown from recovering such previous rents.

PENANG.

RICE, R.,
1818.

September 22.

Action to recover Re. 1.56 pice, for 6 years quit rent from 1st January, 1809, to 1st January, 1815, alleged to be payable on lands situate at "Soonghy Cluan," containing 1 orlong and 6 jumbas, comprised in Grant No. 1036, at 26 pice per orlong *per annum*. Plea: never indebted. Issue thereon.

This action was commenced on the 16th September, 1818, on the "Revenue Side" of the Court, and was brought to test the claims of the East India Company to arrears of quit rent, due during a time when the lands were held by the defendant's predecessors in title. From the evidence, it appeared that the lands

RICE, R.,
1818.
—
EAST INDIA
COMPANY
v.
BROWN.

in question were granted on 1st August, 1803, by the East India Company to one Chay Peng in fee, and by him on 6th March, 1807, conveyed to one James Scott in fee, and on 1st March, 1815, was, under an order of Court dated 12th February, 1812, sold and conveyed by the Sheriff to the defendant in fee. The defendant produced two receipts for quit rent for 1816 and 1817, under the signature of John Hall, the Deputy Collector of Customs, who was dead at the date of this trial. The defendant from the date of his purchase in 1815, remained in possession of the land up to date, his predecessors in title were shewn to have been in possession, the whole of the previous years. Certain letters and Government proclamations were also put in, in evidence, but nothing turned on them.

The parties appeared in person.

Rice, R. entertained no doubt that the defendant, being in possession of the land, was liable for arrears of quit rent, even although they had accrued during the time of his predecessors in title, but held that the receipts for quit rent at a later period than that claimed in this action, being in the possession of the defendant, it raised a presumption in law that all previous quit rents on the land had been paid, and the plaintiffs not being able to rebut that presumption, judgment should be for the defendant. [a]

[a] Allusion is made to this case in *Papers and Correspondence, Land Revenue Administration*, S. S., 1823-37,—published by Hon'ble W. E. Maxwell, 1884.—p. 50.

ISHMAHEL LAXAMANA v. EAST INDIA COMPANY.

In re TREEBECK.

PENANG.
—
CLARIDGE, R.,
1829.

Where a Solicitor in his pleadings stated, that the plaintiff [his client] submitted himself to the Civil Jurisdiction of this Honourable Court.

Held, that he had been guilty of a gross insult to the Court, and he was summarily struck off the roll of Law Agents. [a]

August 20.

This was an action brought by the above named "Laxamana or Admiral" of the then ex-Rajah of Quedah, as his Agent and Attorney, against the East India Company, to recover \$10,000 for damages, and money had and received by the defendants for the use of the said ex-Rajah. It appeared that on the 21st November, 1809, the Rajah of Quedah, through his Laxamana, deposited in the Government Local Treasury, the sum of \$5,000, to be kept until the arrival in this Settlement of the Laxamana, that the latter never again arrived in Penang, and was murdered in 1822, during the Siamese invasion of Quedah, which

[a] This case is reported, not as deciding any principle of law, but partly as matter of history of an extraordinary Order of Court, and partly as having some bearing on the case of *NAIRNE v. RAJAH OF QUEDAH*, [infra] on the subject of the recognition of the latter by the Government. See also *REG. v. TUNKOO MAHOMED SAAD AND ORS.*, Criminal Rulings, VOL. II. of these Reports. 19

began in 1821. The Rajah of Quedah [and family] in consequence of this invasion, sought refuge in this Island, and subsequently died at Malacca, where he had been taken to as hereinafter mentioned. His son, the heir apparent to the throne of Quedah, the plaintiff's principal, being considerably distressed in his pecuniary circumstances, applied to the Local Government for the money to be repaid to him, but this was not granted; it would appear from the statement in the petition, that the sum so deposited had been made use of by the defendants. In consequence of this refusal on the part of the Local Government, the ex-Rajah or Heir apparent, caused this suit to be instituted on the 1st August, 1829, through his Laxamana, who, it was alleged, was the Heir of the deceased Laxamana, and "according to the laws, religion, manners, and customs of the Kingdom of Quedah," was the successor of his deceased father, and entitled to receive the said sum. The above named Charles Trebeck, a solicitor of the Court, acted as the Law Agent of the Rajah and Laxamana in this suit.

CLARIDGE, R.
1829.

ISHMAHEL
LAXAMANA

v.
E. I. Co.
In re
TREBECK.

In 1800, the East India Company [the defendants], through the then Lieutenant-Governor of Penang, Sir George Leith, Baronet, entered into a Treaty with the Rajah of Quedah, [the father of the plaintiff's principal,] which being translated was as follows:—

Translation of a Treaty of Peace, Friendship and Alliance, entered into between Sir George Leith, Baronet, Lieutenant-Governor of Prince of Wales' Island, on the part of the British Government and the King of Quedah, Heaoodeen.

[Seal of Heaoodeen,
SULTAN MOODA,

Son of Ma-Alum Shah, King of Quedah.]

"In the year of the Hejirat of the Prophet, (the peace of the most high God be upon him,) one thousand two hundred and fifteen, the year Ha, on the twelfth day of the month Maharrum, Wednesday. Whereas this day this writing sheweth that Sir George Leith, Baronet, Lieutenant Governor of Pulo Pinang, [on the part of the English Company,] has agreed on and concluded a Treaty with His Majesty, the Rajah Mooda of Purlis and Quedah, and all the officers of the State and Chiefs of the two countries, and to be on friendly terms by Sea and Land as long as the Sun and Moon retain their motion and splendour: the articles of which Treaty are as follows:—

[Seal of Bndahara Patuka
Sri Maha Raja
of Quedah.]
[Seal of Wan
Nga Abdullah.]

"ARTICLE 1ST.—The English Company are to pay annually to His Majesty of Purlis and Quedah, ten thousand dollars as long as the English shall continue in possession of Pulo Pinang and the country on the opposite coast hereinafter mentioned.

"ARTICLE 2ND.—His Majesty agrees to give to the English Company for ever, all that part of the Sea Coast, that is between *Kuala Krian* and the River side of *Kuala Mooda*, and measuring inland from the sea-side sixty orlongs, the whole length abovementioned, to be measured by people appointed by His Majesty and the Company's people. The English Company are to protect this Coast from all enemies, robbers and pirates, that may attack it by sea, from north or south.

"ARTICLE 3RD.—His Majesty agrees that all kinds of provisions wanted for Pulo Pinang, the ships of war, and Company's ships may be bought at Purlis and Quedah without impediment, or being subject to any duty or custom; and all boats going from Pulo Pinang to Purlis and Quedah for the purpose of purchasing provisions are to be furnished with proper pass-ports for that purpose to prevent impositions.

"ARTICLE 4TH.—All slaves running away from Purlis and Quedah to Pulo Pinang or from Pulo Pinang to Purlis and Quedah shall be returned to their owners.

CLARIDGE, B.
1829.

ISHMAHEL
LAXAMANA

v.

E. I. Co.

In re

TREBECK.

"ARTICLE 5TH.—All debtors running from their creditors from Purlis and Quedah to Pulo Pinang or from Pulo Pinang to Purlis and Quedah, if they do not pay their debts, their persons shall be delivered up to their creditors.

"ARTICLE 6TH.—His Majesty shall not permit Europeans of any other nation to settle in any part of his dominions.

"ARTICLE 7th.—The Company are not to receive any such people as may be proved to have committed rebellion or high treason against His Majesty.

"ARTICLE 8TH.—All persons guilty of murder, running from Purlis and Quedah to Pulo Pinang or from Pulo Pinang to Purlis and Quedah, shall be apprehended and returned in bonds.

"ARTICLE 9TH.—All persons stealing chops (forgery) to be given up likewise.

"ARTICLE 10TH.—All those who are or may become enemies to the Company, His Majesty shall not assist with provisions.

"ARTICLE 11TH.—All persons belonging to His Majesty bringing the produce of the countries down the rivers, are not to be molested or impeded by the Company's people.

"ARTICLE 12TH.—Such articles as His Majesty may stand in need of from Pulo Pinang are to be procured by the Company's Agents, and the amount to be deducted from the gratuity.

"ARTICLE 13TH.—As soon as possible after the ratification of this Treaty, the arrears of gratuity now due, agreeable to the former Treaty and agreement, to His Majesty of Purlis and Quedah, are to be paid off.

"ARTICLE 14TH.—On the ratification of this Treaty, all former Treaties and agreements between the two Governments to be null and void.

"These fourteen articles being settled and concluded, between His Majesty and the English Company, the countries of Purlis and Quedah and Pulo Pinang shall be as one Country, and whoever shall depart or deviate from any part of this agreement, may the Almighty punish and destroy him; he shall not prosper.

"This was done and completed, and two Treaties of the same tenor and date interchangeably given between His Majesty and the Governor of Pulo Pinang, and sealed with the seals of the State Officers immediately officiating under His Majesty, in order to prevent disputes hereafter."

In 1821, as stated, Quedah was invaded by the Siamese, the Rajah had come over to Penang with his family, including his Heir apparent, the Plaintiff's principal, for refuge, at the suggestion of the local Government. On the 20th June, 1826, after the Siamese had made themselves masters of Quedah, a treaty was concluded by Major Burney, for and on behalf of the East India Company, and the King of Siam, by which the East India Company recognized the rights of Siam over Quedah. By this Treaty the ex-Rajah of Quedah is styled the "former Governor of Quedah" and by Article 13 it is provided among other things that—

"The English engage with the Siamese . . . not to permit the former Governor of Quedah, or any of his followers, to attack, disturb or injure in any manner, the Territory of Quedah or any other Territory subject to Siam. The English engage that they will make arrangements for the former Governor of Quedah, to go and live in some other country, and not at Prince of Wales' Island, or Pory, or in Perak, Salangore, or any Burmese Territory. If the English do not let the former Governor of Quedah go and live in some other country as here engaged, the Siamese may continue to levy an export duty upon paddy and rice in Quedah."

Immediately on the conclusion of this Treaty, the ex-Rajah and his family, including the Heir apparent aforesaid, who were still refugees in Penang, were detained by the East India Company as State prisoners, and subsequently removed to Malacca, where the ex-Rajah remained a State prisoner till his death, as aforesaid. It was whilst the Heir apparent was so detained in Malacca, that he commenced the present proceedings in this Court against the East India Company through his Laxamana. Mr. Trebeck it appears, was a Solicitor and Advocate of the Calcutta High Court

and had been so, for a period of forty-three years. On the 4th October, 1827, he was admitted as a General Agent of this Court, and in fact was the first lawyer enrolled by the Court under the second Charter. By the provisions of the Charter of 1826, it is enacted, that the Court had authority "at its pleasure, either assigning a Reason, or without assigning any Reason whatever, to withdraw or vacate any Permission or License which shall, at any time, be granted to any Person or Persons to act, generally or specially, as the Agent or Agents of any suitors or particular Suitor of the said Court." It was then the practice of the Court, for the plaintiff to state in his Petition of Complaint, that he submitted himself to the jurisdiction of the Court in the particular case in hand. In the present occasion, the plaintiff's Petition of Complaint, as drawn up by Mr. Trebeck, began by stating: "Your petitioner is an inhabitant of Prince of Wales' Island aforesaid, and, in respect of the matter hereinafter complained of, submits himself to be subject to the civil jurisdiction of this Honorable Court." The defendants on the 8th August, merely pleaded the Statute of Limitations [six years] in answer to the action. On the case coming on for hearing before the Court this day,

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Trebeck, the plaintiff's Agent, rose to open the case on behalf of his client, but

Claridge R., called on the Agent for the defendants, and asked whether he had observed any particular averment in the first clause of the Petition, as he the Recorder, thought it was his duty as the Company's Agent to have done so.

Cawnter, for the defendants, stated that he had not observed anything particular in the clause.

Claridge R., said, he was surprised at that, for he considered the clause as passing the grossest insult upon the Court and its jurisdiction. That he would not sit there and permit such statements to be made; and that he should call upon the Agent of the plaintiff to state, if he could, any justification for such conduct. Anything more insulting than the clause in question could not be conceived, when it was known that every inhabitant of this Island, whosoever he might be, was subject to the jurisdiction of the Court; and that he could not and would not listen to any petition framed in such highly gross and insulting language to His Majesty's Court. He, thereupon called upon Mr. Trebeck to justify himself, and stated that unless the Court was fully satisfied, the most serious consequences would ensue to him.

Trebeck. May it please Your Lordship. I am called upon in this stage of the case, and before I am suffered to open my client's case, to justify my professional conduct. This I am fully prepared to do, premising, that neither my client, nor his principal, the unfortunate King of Quedah, nor myself, could have had the most distant motive or wish to state any facts which could in the least be offensive to the Court; nor ought any matters stated in a petition, with a view to avoid legal objections, be construed to be offensive, where no offence could possibly be meant. My Lord, the statement in the petition was made by me

CLARIDGE, R. as the professional adviser of the plaintiff and his principal, and
1829. I shall endeavour to shew that the wording was true, proper and
ISHMAHEL justifiable. I know, my Lord, that the defendants having pleaded
LAXAMANA the Statute of Limitations in such a case as the present, will
v. drive me at all points; but at all points am I ready to meet them.
E. I. Co. I know, that one of the points that they may endeavour to make
In re is, that I have not obtained Administration from the Ecclesiastical
TREBECK. side of this Court. I am ready to meet them on that point
and say that my client is a subject of the King of Quedah,
and I am at a loss to know how the Patent of the King of
England establishing a Christian Ecclesiastical Court here,
can extend itself over the Mahomedan subjects of the King
of Quedah. But, I shall be prepared in due time, to meet that
part of the case. It was for the express purpose of avoiding the
plaintiff submitting himself to the Ecclesiastical jurisdiction of
this Court, that I inserted the general expression in the jurisdiction
clause complained of, and stated that he submitted himself
to the *Civil* not *Ecclesiastical* jurisdiction of the Court, knowing
that considerable doubts exist as to the extent of the Ecclesiastical
jurisdiction of this Court, and the power to compel natives
to take out administration. [a] I hope that this cause will not
require me to go farther into that subject. As the legal adviser
of the Plaintiff, I, from caution, not from disrespect, inserted the
words I have done, and had I not done so, I think I should not
have done my duty to an unfortunate man, who, through the
means of the plaintiff, is calling for that which, if he is not
deprived of, may prevent the cruel state of want to which he has
been driven, for these two years past.

Claridge R. (addressing himself to Mr. Patullo). Mr. Patullo, you, I believe, are Secretary to the Government; do you know whether the Government of this Island, recognizes any person to be King of Quedah?

Mr. Patullo. "No, my Lord, I believe not."

Claridge R. Then do not let us hear anything more as to the King of Quedah.

Trebeck. This is certainly the first time I have heard that the Government here does not recognize there is a King of Quedah! Have they forgotten the man who for these last two years has been reduced to penury, who sought British protection, and at one time found it? They have forgotten the son of the Grantor of this Island, and they have now [with what justification is but known to themselves] forgotten to pay my client the tribute under which this very Island is holden. My Lord, I know of no act whatever which has been done either by the present King of Quedah, or by his late father, by which either of them have, in any wise forfeited, or on their part relinquished, the sovereignty of the Kingdom of Quedah; and it would be best not to enquire too narrowly into that subject. My client is in fact and in truth, King of Quedah; and this Island is within his

[a] On this, see *Re Tirwahier Kirsnapa Mudali, deceased*, 1 Mad. H. C. Rep. Q. C., p. 60.

Kingdom, and tributary to him, were justice done to him. I am prepared, if necessary, to shew, that his seeking protection here, according to the Laws of Nations, so far from being a relinquishment of Sovereignty, is a confirmation of his Sovereign rights, as from the protecting party. I know not what arrangements were made at the time of the King of Quedah taking refuge in this Island, but I do know that he submitted to some reduction in the tribute; and that certain salaries were paid to his officers who were driven away by the Siamese invasion: and I know that my client was appointed to the office of Laxamana, and continued to receive the salary of that office, from the Defendant Company, and did receive it regularly for many years, and until the Government of this country, chose to stop that salary, on the commencement of this action. I suggest, therefore, in point of law, whether there may not be a sort of concurrent jurisdiction of this Court; and that the establishment of this Court did not vary the Sovereign right of the King of Quedah. Why the treaties with the King of Quedah are not to be made publicly known, when the people are supposed and expected to obey them, I know not; but this I do know, that those which have met the public eye did not grant to the King of England, the Company, or to any other power, the Sovereignty of this Island; nor did it more than particularly grant the power of trying for certain offences. Shall, then, the United Company of themselves set up and pretend that they have even the shadow of Sovereignty? The doing so would be but little short of Treason: for if any Sovereignty was relinquished by the King of Quedah, it could only have been to His Gracious Majesty the King of England, and not to the Company. The United Company cannot use or exercise actual Sovereignty in any part of India. They have power; but that can only be such power as the law has given them. No such power exists in this Island. But, my Lord, this has drawn me into matter rather beyond that immediately connected with the previous question, of whether I may be permitted to open the Plaintiff's case or not; and I do trust that I have fully stated, why I have thought it my duty to be guarded in the first clause of the petition, and had I not been so, I should have been derelict in my duty to my employers.

Claridge R., said, that he was not satisfied with the explanation that the plaintiff's Agent had given; and that he could not sit there and hear the jurisdiction of the Court questioned, and it was impossible for any Judge to have listened to such language as had that day been addressed to the Court, without feeling obliged to mark his disapprobation of it in the strongest manner. The Agent must take the consequences of having not only stated such matter in the petition, but of the declarations which he had thought necessary to make, of matters of a most dangerous tendency; and calling upon the Registrar of the Court, directed him to strike Mr. Trebeck's name off the Roll of Law Agents.

Trebeck hereupon rose and stated the great injury which would be sustained by his clients and himself, by the proceedings

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which had been adopted. He appealed to the learned Recorder, as a Judge, as a Barrister and as an Englishman, to whom freedom of speech was a privilege, whether in his performance of his duty to the best of his abilities, unmarked by any professional frauds, without any blame upon his professional conduct, but only upon a matter of form in pleading, he was to be deprived, after a career of nearly five and forty years in the profession, and in various of branches of it, of his means of support, and a slur to be cast upon his conduct, which at most, could only be construed into overzeal for his client, equally an unfortunate man as himself. He offered to amend the petition as the Court might direct, hoping that the Court, as all the plaintiff's witnesses were in attendance, would allow him to proceed as a special Agent in this action.

Claridge R, said something had been said about the rights of a Barrister addressing the Court with freedom in the discharge of his duty to his client. No one could set a higher value on the privilege, than he did, as a member of the profession; and that God only knew how entirely he disclaimed any wish to abridge it. This Court exercised all the powers of the Court of Chancery, King's Bench, &c., in England, and could any one for a moment suppose that any one of the most learned and eminent persons at the head of those Courts, would tolerate a Barrister asserting before him, that there existed in England, a jurisdiction concurrent with that of the Legislature, and exercised by a Foreign Prince, within the Realm of England, and to whom the country had paid tribute. It was impossible to allow any Agent who had used these and other expressions, to remain on its Rolls any longer, and he therefore must make the order he had already made,—he must strike the present petition off the files, and also refuse Mr. Trebeck's request either to hear the case, or admit him as a special Agent therein. If Mr. Trebeck had any proposal to make, it must be by petition, in the usual way. The Registrar would take care, that if the Laxamana amended his petition, that no improper matter was introduced into it, particularly matters reflecting on the East India Company, the Government or the Judges.

Plaintiff's petition struck off the File—his Law Agent struck off the Rolls. [a]

The petition was never afterwards amended, and the note

[a] The following is a copy of the minute, made by the Registrar of the order given on this occasion, which is also to be found among the Records of the Court. From it, it would appear, the real and *only* ground for the order, was that mentioned in the marginal note at the head of this case:

“ Thursday, the 20th day of August, 1829.

Court opened.

Present.

The Honorable Sir John Thomas Claridge, Kut., Recorder.

Ishmahel Laxamana—*Plaintiff.*
against

The East India Company—*Defendants.*

PLEA—

Cause called on for hearing.

thereon shews that it was struck off the files as ordered. **Mr. CLARIDGE, R.**
Trebeck appealed against the order made as to himself ; to the Jus-
 tices of the Court, consisting of the Honorable Robert Fullerton, 1829.
 Governor of Prince of Wales' Island, and President of the Court, **ISHMAHEL**
 and the Honorable Robert Ibbetson, the Resident Councillor, by **LAKAMANA**
 three petitions. The first of these is dated 9th December, 1829 [a],
 the next 19th May, 1830, and the third, 5th June, 1830. To the
 first of these petitions, the said Justices replied, that "as the
 " Professional Judge had thought proper to direct the petitioner's
 " name to be struck off the list of practitioners, the Court would
 " not restore him to his former position, and they could not there-
 " fore comply with the prayer of his petition." On the Court being
 further asked by the Registrar, at the petitioner's request, if it
 was also intended to prohibit the petitioner from acting as an
 Agent specially, said that "petitioner's name having been struck
 " off the list, they could not admit him to practise at all." To the
 second of these petitions no reply was given, and on the 3rd peti-
 tion being presented, pressing for a reply, the following minute
 was recorded : "The Judges of the Court on consideration of the
 " address, see no reason for altering the decision already commu-
 " nicated to Mr. Trebeck." In the second of these petitions is
 the following paragraph : "That he [meaning Sir John Claridge]
 " afterwards found he had acted with rashness is clear, from his
 " having through his new friend and élève, Mr. Lawes, [an Agent
 " of the Court,] communicated thrice with me in the course of
 " the following 24 hours, that if I would petition the Court,
 " acknowledging my supposed error, he would restore me to my
 " standing, but I revolted at doing so, feeling that as a profes-
 " sional man, I had done no more than my duty, and that as a
 " gentleman, I could not sue, where the offence was committed
 " by the other party. I therefore replied to all the offers sug-
 " gesting, that as Sir John Claridge must be fully aware of how he
 " had wronged me, and injured those who were looking to me for
 " my professional exertions, it was entirely resting upon his own
 " conscience, as an honest man, to do me justice, without his

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* Action to recover Spanish Dollars 10,000 damages sustained on account of money
 had, received and advanced.

Petition filed 1st August, 1829, read.

Plea filed 8th August, 1829, read.

Mr. Trebeck for the Plaintiff.

Mr. Caunter for the Defendants.

Before the Court would allow Mr. Trebeck to open his case, he is called upon to
 explain the meaning of the introduction of the following words in the commencement
 of his petition, which, as they stand, the Court consider highly insulting to its dignity :

"That your Petitioner is an inhabitant of Prince of Wales' Island aforesaid, and,
 "in respect of the matter hereinafter complained of, submits himself to be subject to the
 "Civil Jurisdiction of this Honorable Court."

Mr. Pattullo, the Secretary to Government being in Court is asked by the Honora-
 ble the Recorder if there is any Person at this moment recognized by Government as
 the King of Quedah, and to which Mr. Pattullo replied "I believe not."

Mr. Trebeck failing to afford any satisfactory explanation of his conduct, It is
 ordered that the Registrar of the Court do forthwith strike the said petition off the files
 of the Court, and further that he do strike out the name of Mr. Trebeck as an Agent and
 Attorney of the said Court from the Roll."

[a] Sir Thomas Claridge had then left the Colony in consequence of his re-call.
 See Preface.

CLARIDGE, R. "calling upon me as a professional man, to submit my clients
1829. "rights, if for the unworthy purpose of my own professional
"advantage." [a]

ISHMAHEL
LAXAMANA.

v. [a] Mr. Trebeck after being struck off the Rolls, acted as a Conveyancer, and in the
E. I. Co. latter part of 1830, was appointed Agent to the Rajah of Quedah. This post he held,
In re though evidently with little or no pecuniary advantage, till his death in Singapore on
TREBECK. 21st October, 1831.—J. W. N. K.

WILLIAM CAUNTER v. EAST INDIA CO.

PENANG.

MALKIN, R.
1833.

April 6.

Where the Defendants offered the Plaintiff the post of "Law Agent to the Company," and the plaintiff accepted the offer, subject to a guarantee being given for his continuance in the office, and in reply the defendants wrote him, that his appointment would be "subject to confirmation or otherwise, of the Court of Directors."

Held, that this reservation in favour of the Court of Directors, was not to be understood only as a power to be exercised at once, but also extended to their annulling the Plaintiff's appointment at a future time, if its continuance became, in their opinion, undesirable.

By the Charter of 1826, the Court of Judicature consisted of the Governor as President, the Recorder, and the Resident Councillors as Judges: the Recorder having been re-called, and the titles of "Governor" and "Resident Councillor" changed to those of "Resident" or "Commissioner," and "Deputy Resident."

Held, that the suspension of the Court by the local authorities during the period that this was so, was an unnecessary and improper act,—for the principal officer of the Defendant Company, by whatever name called, was impliedly at liberty under the Charter, to act as head of the Court, and the principal officer resident in the Settlement under him, to act as the third Judge; and that the title "Governor" and "Resident Councillor," in the Charter, was merely the official designation of those officers as then known, and a change of such their designation, did not prevent them from sitting as Judges of the Court. [a]

Held, also that the suspension not being the legal and necessary consequence of the alteration in Government, but an unauthorized act of the local authorities, [b] the Plaintiff could not be deprived of his right to act as Law Agent of the Company, and was entitled therefore to recover the salary which he would have earned, had the local authorities not fallen into the error. [c]

The payment by the Defendants to the Plaintiff, of the amount of his judgment and costs, does not prevent the Defendants afterwards appealing, against such judgment.

This was an action for the recovery of Rs. 19,700 for arrears of salary as the Honorable Company's Law Agent in Penang at Rs. 600 per month, from the 1st July 1830 to the date of his petition before the Court. It appeared from the documents called for by the Plaintiff and admitted on the part of the defendants, that he had been engaged by the late Governor Fullerton at the period, and at the rate of salary abovementioned, and under a guarantee exacted and accorded by the late Governor in Council, that the Plaintiff's appointment should be *subjected to the confirmation on otherwise of the Court of Directors*; that the plaintiff continued discharging the duties of Law Agent to the Company until about the end of June 1830, when, just before the abolition of the 4th presidency, [Penang] he was officially inform-

[a] See Vernon Allen v. Meera Pullay and others, 26th Sept., 1877, *infra* 394

[b] See Preface—time of Sir John Claridge, R.

[c] By Ords. 3 and 30 of 1867, the Governor and Resident Councillors, ceased to be Judges of the Court. See also Ord. V. 1878 s. s. 4—7.

ed by the Secretary of the Straits Government, that in consequence of the alteration of the establishment by order of the Supreme Government, in accordance with instructions received from the Court of Directors, his services as Law Agent would be dispensed with after the last day of the month. The Plaintiff remonstrated, claiming the terms of his guarantee; his application was referred to the Supreme Government, and he was answered that in consequence of the abolition of the Government and the cessation of the functions of the Court of Judicature, his appointment ceased as a matter of course. On the revival of the Courts operativeness in June, 1832, the Plaintiff again applied and tendered his services to Governor Ibbetson, and was again answered that the decision of the Supreme Government formerly conveyed to him was conclusive on the subject. Upon the arrival of the Recorder [Sir B. Malkin] he commenced this suit against the Company for the arrears of his salary from the period of his ceasing to be paid. This in substance, was the Plaintiff's case, and he appeared in person.

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Balhetchet, on the part of the East India Company, produced a copy of a letter from the Court of Directors ordering the abolition of the Government of the Straits Settlements, and directing the Supreme Government to have their orders carried into effect; also an original letter of that Government, grounded upon the former, instructing Governor Fullerton as regarded the intended reduction. He contended that the minute of Governor Fullerton in Council, upon which Mr. Caunter had built his guarantee, contained no specification as to the manner in which the Court of Directors' confirmation or otherwise should be conveyed to him and it was enough that their pleasure was made known to him through an official authority; which it had been even through that authority from which he had received his appointment. It was true that Mr. Caunter's name did not appear in the Court of Directors' letter as one of the Company's servants to be put out of office, and it would have stood singular, and marked with a distinction not deemed necessary towards officers of much higher rank and longer services, had it been so distinguished, for excepting of such officers as were recommended for the formation of the new establishment, not a name was mentioned. In fact the order of the Court of Directors, upon whose approbation or disapprobation depended the continuance of Mr. Caunter's situation, which had been newly annexed to the Government, went to abolish at once the *entire fabric of the old establishment* and to create a new one. It was not necessary in doing the first to particularise, where *all* was included; and as neither Mr. Caunter's name nor office was mentioned in the new arrangement, it was clear that the Court of Directors considered him as dismissed in common with all the old establishment, and not one of those required to be incorporated in the new. In reading over the late Governor Fullerton's Minute of Council authorizing Mr. Caunter's appointment, some stress had been laid upon the appellation there given to it of a "judicial appointment," seemingly with a view to connect it with the establishment of the Court which had again become

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operative. It was, however, very obvious, that the late Governor could never have considered Mr. Caunter a member of the Court Establishment or chargeable thereto. His was an appointment *bond fide* in aid of the old executive; it was paid as such, and it ended with the expiration of that Government, for whose assistance it was created.

Caunter, in reply, thought it incumbent upon him to notice a fallacy that lurked at the bottom of the arguments just delivered, and which materially affected the question to be decided by the Court. It consisted in an assumption not warranted by the terms of the contract, namely, that he had been retained as the Law Agent of *Government*, and not as the Law Agent of the *Company*. It was true, that it had not been expressly so asserted; but was nevertheless equally evident, that the entire fabric of the reasoning on the other side was based on this notion. The Company, and the Government, were, by many supposed to be convertible terms; and the distinction, perhaps, might not be immediately obvious; but in truth, it was often very material, and particularly so, in the present case; because by establishing a necessary connection between his appointment and the Government which was afterwards abolished, it was easy and natural to infer the determination of the contract itself. If it could indeed be shewn, that the premises were true, the conclusion deduced would be no doubt fair and rational; but a reference to the correspondence in Court would clearly prove, that he was always styled and recognized as the Law Agent of the Hon'ble Company [a] and as their affairs continued to be administered at this island, though under a different establishment from the former one, his appointment might subsist independently of any particular form of administration that the Company might think fit to introduce into these Settlements, so long as nothing had occurred to render the Charter of the Court inoperative. In that respect, therefore, the office of Law Agent stood on a footing widely different from the other offices, which in their nature were so intimately blended with a specific constitution of the Government, that apart from the integral body, they could not be said to possess any existence whatever: such, for example, were those of a member of Council, in an Indian Presidency,—a Secretary to Government, Accountant-General, and similar offices, the extinction of which, would be necessarily involved in the abolition of the Government itself. The question, therefore, to be considered in the present case, was, whether a *general order* from the Court of Directors to *remodel* (not *annihilate*) their existing Establishment in the Straits, necessarily implied a power in their Agents to interfere with an appointment, which might subsist just as well under the new as the old form of Government, an appointment, moreover, that was held under an express stipulation for its continuance, subject to the confirmation or disapproval of the Directors, and which from

[a] By a letter dated 14th April, 1828, on record, and forwarded at the time for the information of the Court, it is stated that Mr. Caunter had been appointed "Law Agent to the Honorable Company."—J. W. N. K.

their silence he had a right to presume was not in their contemplation, when they issued the order in question. He then proceeded to institute a comparison between the present case, and that of a private merchant established in London, who might have become bound by a similar guarantee given by his Agents in India to a third person, and ended by contending that as no act of the Hon'ble Court of Directors could countervail His Majesty's Patent under the great seal, the Court of Judicature had never been deprived of existence during the period, for which he claimed his arrears of salary. That his dismissal from employment on the 30th June, 1830, was an invalid act of the local authorities, and that he was consequently entitled to the judgment of the Court, for the full amount of his arrears from that time to the date of filing his petition, namely, Rs. 19,700 with costs of suit [a].

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Cur. Adv. Vult.

April 13. *Malkin R.* The first question in this case was whether any guarantee had been given by the local Government for Mr. Caunter's continuance in the situation to which he was appointed. There was none expressly, but looking to the whole correspondence, it could not be doubted that a guarantee to some extent was contemplated by all parties. Mr. Caunter's first application expressly demanded one; in consideration of his abandoning his former employments, he solicited a guarantee from Government that he should continue in their service, subject to a confirmation of the appointment by the Court of Directors.

The minute of the President, recorded on the proceedings (signed also by Mr. Ibbetson, the Resident Councillor,) stated his opinion that the necessity of the case rendered the acceptance of the services of Mr. Caunter on the *terms proposed* unavoidable, and a copy of the minute was communicated to Mr. Caunter. The Official letter, however, informing Mr. Caunter of his appointment, merely stated that his services were accepted at 600 rupees per month. On this Mr. Caunter wrote again on April 19th, 1828, acknowledging the receipt of that letter. The last paragraph of that letter I think very material, which says "inferring from the terms of your communication that this appointment

[a] The following is the Notification that appeared at the time announcing the change of Government.

NOTIFICATION.

"Whereas the Settlements of Prince of Wales' Island, Singapore and Malacca, having from this day ceased to form a separate Government, and having become Settlements subordinate to the Presidency of Fort William, according to the orders of the Honorable Court of Directors, and the Supreme Government, to be managed by a Deputy Resident at each Settlement, subject to the general superintendence and control of a Resident or Commissioner, notice is hereby given that all official References and Reports are henceforward to be submitted in the first instance to the Deputy Resident, respectively in charge of each Settlement.

By order,

J. PATTULLO.

June, 30th, 1830.

Secretary to Government.

MALKIN, R. "has been conferred upon me under the guarantee which I took
1833. "the liberty of soliciting, it only remains for me to offer my
CAUNTER "acknowledgments, &c." This was a form of expression which
v. I think could not warrant the Government in considering that
E. I. Co. Mr. Caunter had determined on rendering his services unless he
 received the guarantee in question, and if the Government had
 given no answer to this letter, but had gone on actually to employ
 Mr. Caunter, without further communication, I think they must
 have been understood to employ him with the guarantee re-
 quested.

It appears that an answer was given, and Mr. Caunter was
 informed in pursuance of the minute of April 12th, that his
 appointment would be subject to the confirmation or otherwise of
 the Honorable Court of Directors. I am of opinion that on the
 same principle that the employment of Mr. Caunter without any
 further communication would have been an employment on the
 guarantee demanded this must be so, except as far as the commu-
 nication varied it; and it seems to do so only, if at all, to the
 extent of guarding against any notion that the Court of Direc-
 tors were to be considered irretrievably bound by the act of the
 local Government.

It might, however, be a question whether, Mr. Caunter's
 appointment was to have any validity independently of the
 information of the Court of Directors, that is to say whether the
 expression of their sanction was necessary to its validity, or of
 their dissent to its determination, and the question is material;
 because no express directions were ever given by the Court on the
 subject. It appears to me that the dissent of the Court ought to
 have been expressed.

The local Government was entrusted with large powers, and
 if in the exercise of them, they entered into contracts and pro-
 cured the performance of certain services on certain terms, their
 employers, who hold them out as their General Agents are bound
 to make good their contracts at least till they give notice that
 they disallow them. And in the present case this opinion seemed
 to have been acted on, because Mr. Caunter had received his salary
 for all the time of his actual employment, although if the expres-
 sion of the consent of the Court of Directors was a condition pre-
 cedent to the validity of his appointment, he was not entitled to
 anything but a compensation in each particular service rendered,
 equal to the value of the labour employed; and because the letter
 announcing the intended termination of his office treated it as
 one actually existing up to that time: "it has," says the com-
 munication, "become necessary to dispense with your services as
 "Law Agent to Government from the 1st proximo."

If then there was a guarantee and it was necessary that the
 Court of Directors should exercise their dissent to determine the
 office, it remains to enquire what was the extent of the guarantee,
 and what evidence of dissent was necessary.

I think it is clear that the guarantee was not to bind the
 Court; and also that it would be wrong to consider it as pledg-

ing even the Local Government absolutely and under all circumstances, to the continuance of the office. **MALKIN, R.**
1883.

It is not, however, necessary to enter very particularly into its construction. The Local Government would not have been at liberty to displace Mr. Caunter because they thought they had found a more qualified person, or because the amount of litigation had diminished and they thought his services no longer worth his pay, or because they did not choose to institute or defend any more suits, or because they, of their own will, in the absence of another Judge, did not choose to open the Court, and therefore did not want his services during its temporary suspension: but as Mr. Caunter's offer was principally with a view "to the conduct of their business in the Court of Judicature," I think that if the Court were at any time suspended, not of their own mere will and notion, but necessarily as by the death or unavoidable absence of all the Judges, they would be at liberty at least to suspend his employment, or refuse his salary, even without any communication from the Court of Directors.

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In fact, the functions of the Court of Judicature were suspended on the abolition of the Government, and this was the reason for the discontinuance of Mr. Caunter's employment. I am of opinion, that if his were a necessary and proper suspension, the local authorities, on the construction of the guarantee already suggested, were justified in so discontinuing his services in the exercise even of their own discretion, notwithstanding the guarantee. I am also of opinion, that if the suspension of the Court were a necessary and proper consequence of the orders of the Court of Directors, those orders must be considered as a virtual dissent from the further continuance of Mr. Caunter's appointment; and that it would therefore be annulled by virtue of the power of dissent reserved to the Court, because, according to my views, that power cannot be understood as one only to be exercised at once, but that it reserved to them the right of annulling the appointment if its continuance became undesirable. I will go even further and say, that if the discontinuance of the functions of the Court of Judicature was not a necessary and proper consequence of the alteration of the Government, yet, if the Court of Directors clearly appear to have so considered it—that alteration would virtually have implied in their understanding the abolition of Mr. Caunter's office, and would therefore in my judgment, have amounted to an intimation of their dissent from its continuance. It did not appear that the Court of Directors so understood the effect of the alteration. In the 13th paragraph of the Despatch of 7th April, 1829, they spoke among other existing and continuing charges, of the charge of the Judicial Department amounting to 120,000 rupees, in which they trusted thereafter to make an important reduction. And in the 26th paragraph, they say "we are aware that this alteration in the mode of administering the Government of Prince of Wales' Island, Singapore and Malacca will render necessary a corresponding alteration in the terms of the Charter of Justice

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"recently granted by His Majesty ; we shall give directions for taking measures for obtaining the required amendments of the Charter, &c., and we shall probably be enabled to communicate to you the result of these measures at an early period."

I consider the first of these extracts, clearly contemplating the immediate continuance of the Court of Judicature ; for the expense mentioned, is that of the whole establishment, much of which, might have been immediately and for once dismissed, if there was no longer any services to render ; and there is equally nothing in the second extract, to show that they considered the functions of the Court as likely to be suspended by the proposed alteration, although corresponding changes might be made expedient, or even necessary. It is also to be observed, that the plan then proposed by the Court of Directors was not that which was finally carried into effect ; but one which, leaving the Settlements without any general head, corresponding to the Governor, —made it more difficult to carry the Charter into effect.

It seems to me therefore, that it would be too much to treat the Despatch from the Court of Directors as furnishing evidence that they thought that the change of the Government would produce a suspension of the functions of the Court, unless in fact that was its legal operation, and the judgment in the present case will finally turn on the very important question, was that suspension a legal and necessary consequence of that alteration. If it were, I think the plaintiff must fail ; if it were not, then the suspension which in fact took place, was an erroneous and unauthorized act of the local authorities, and cannot deprive the plaintiff of that right which, if they had not fallen into that error, he would have continued to possess.

It is to be observed, that the Charters of Judicature, both of Prince of Wales' Island, and for the United Settlement, were granted, although on the application of the Company,—for the benefit of the community, and derived their whole force and validity from an Act of Parliament, and the prerogative of the Crown. The Company could not surrender the Charter, unless the Crown were pleased to accept the surrender. Generally, in short, it can have no power whatever of abolishing or abridging the grants of the Crown for the benefit of the subject ; and it can only have it in the present instance, if at all, incidentally, by the power reserved to it to alter the administration of the Settlement. If it had thus the power of abolishing the Court of Judicature, I think the abolition total, for it had none whatever of substituting any other administration of justice in its stead ; and the jurisdiction of the Supreme Court of Fort William was entirely abrogated as far as Singapore and Malacca were concerned, by the Stat. 6, Geo. IV., C. 85, l. 19, and the subsequent Charter ; and it never existed with respect to Prince of Wales' Island, which had a Charter of Judicature of its own, before the annexation of the other Settlements. We would [as Malacca and Singapore were] have been left for some years without any provision whatever for the administration of justice, and perhaps would still continue so.

I cannot think, it was intended, that the Court of Directors should have such a power, nor, if they had it, is it to be supposed that they intended to exercise it.

If upon any construction of the Charter, or of their own acts, it was possible to avoid such a consequence, I think, that construction ought to be adopted. And in fact, such a construction seems to me plain and easy. I am aware, that it has been said, by an authority of which I would speak with high respect, the present Advocate-General, [opinion of February, 21, 1831] that the Charter was granted to Penang, Singapore, and Malacca, as to an united and independent settlement, independent at least in the same sense as Fort St. George and Bombay. I cannot, however, concur in this opinion. The object of the Charter was to give to the inhabitants of the three places, the benefit of a regular administration of justice, which they needed just as much, whether they were united and independent, or separate and subordinate to any Presidency. Prince of Wales' Island in particular, which stood alone, had been thought to require a Charter, but the construction suggested would deprive it of any, merely, because after a temporary union, it reverted to its original condition, with respect to Malacca and Singapore. The formation of the United Settlement undoubtedly was so far the inducement to the establishment of the new Court, that it was thought to furnish a convenient mode of constituting it, by making the Governor, or Principal Officer of the three Settlements, its head everywhere, the Recorder its Chief Law Officer throughout, and the Resident Councillor, or first officer of the Company's Civil Service, Resident constantly at each Station, the remaining Judge of the place of his own abode.

It appears to me therefore, that the safest construction of the Charter is to consider it as constituting the Principal Officer of the Company superintending the affairs of the three Settlements, [as long as there was such an officer] the head of the Court, the principal officer, resident at each and subordinate to the general head of the establishment, the third Judge at each place, and to say, that the terms "Governor" and "Resident Councillor," were used, not as designating the exact office to which only the judicial powers were to be annexed, but as the names of office by which, for the time being, the functionaries in question were denominated, and in this opinion, I think, I am, in some degree, confirmed by the circumstance, that the Charter, in some cases recognizes a Judge, who is neither Governor, Recorder, nor Resident Councillor, for in the absence of the Resident Councillor, the Senior Councillor present is to be a Judge, and the Governor, or Resident, or the Councillor acting as such, is to have certain precedence, and to vote in a certain order in the Court. On the whole, therefore, I think that the first and second, for the time being, in the administration at each Settlement, [at least while the first is so in all the three,] were the Judges intended by the Charter, and some confirmation is given to this opinion, that at the time of the alteration at least, no harm could be done by such a construction, because

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MALKIN, R. Mr. Fullerton and the other gentlemen who held the abolished
 1833. offices, continued to hold those substituted, and could not lose
CAUNTER their individual and personal competence to the discharge of the
 v. duties, by a mere change in their official designation.
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The consequence of this construction is, firstly, that the Court was unnecessarily and improperly suspended on the alteration of the Government; and then, in conformity with the principles already stated, that such suspension of its functions, could not deprive the plaintiff of the benefit of his contract.

The opinion that the suspension was unnecessary, is not my own only; it seems to have been that of the Supreme Government of Bengal, who in their despatch of the 4th May, 1830, paragraphs 28 and 29, gave directions as to the despatch of judicial business, until the arrival of the new Charter, which was then expected, and in the 29th paragraph say, that "the Court at each Settlement should be held by the Resident and his Deputy, at the Settlement, in the same manner as heretofore, by the Governor and Resident Councillor, and the Resident should proceed on circuits, for the purpose, as the Governor had done hitherto." It is true, that they go on to speak of the inconvenience arising from the impossibility of literally fulfilling the old and still existing Charter, but whatever this inconvenience might have been, it was obvious, that the functions directed to be exercised by the Resident and his Deputy could be derived only from that Charter.

I think, the same opinion appears with equal distinctness in the despatch of the Court of Directors of 27th July, 1831, to the Supreme Government of Bengal [a], in which they announced their abandonment for the present, of the design of obtaining a new Charter, and give the Resident and Deputy, or Assistant Resident, the title of Governor or Resident Councillors. I believe, this measure has sometimes been considered as a recognition of the necessity of doing something to re-establish the Court. It clearly, however, was not so in the opinion of the framers of the despatch.

The alteration of title was only made in order that all doubts might be removed regarding the powers under the old Charter of the Resident and Deputy Resident; and express reference was had to a former despatch, intimating that the former Governor "was mistaken in supposing, that the alteration in the Government could cause the Charter to become inoperative." Even independently of any such expressions, I entertain no doubt, that the Company, acting as they would on such an occasion, under good legal advice, could not themselves imagine that a Court once dissolved by the abolition of the officers to which the character of judge was annexed, could be reconstituted by a mere restoration of the name of office, while the offices themselves continued on their reduced and altered footing, and I should therefore conclude, that the alteration of name, was made merely to take the chance, of thereby avoiding the question, and not with any notion that it really affected the right.

[a] For this despatch, see *Report of Indian Law Commissioners*, 1843, p. 48.

On the whole, therefore, I am of opinion, that the plaintiff is entitled to recover in this action. The cause is one of considerable importance, and by no means free from difficulty, and I am glad that it is in the power of the defendants to submit it, if they are disposed, to a future investigation by a higher tribunal. But to me it appears, that the plaintiff held his appointment under a guarantee for its continuance, which had in no way been abrogated or dispensed with, that the defendants had not in fact refused their sanction to his appointment, nor done anything to shew a decided intention that it should not continue,—that the suspension of the Court, was not a necessary or proper consequence of the alteration of the Government,—that it must therefore be considered a voluntary act of the local authority, and could not authorize them, contrary to their guarantee, to discontinue the plaintiff's services.

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Judgment for plaintiff with costs.

November, 19th. *Balhetchet* on behalf of defendants moved for leave to appeal to His Majesty in Council on the following grounds:—

1st.—That the local authority which notified to Mr. Caunter the discontinuance of his employment, was empowered by the Governor-General of Bengal, under instruction from the Court of Directors, to abolish every office of the Executive Establishment of these Straits, and that at the issuing such instructions, the said Court was fully aware of the existence of Mr. Caunter's office as part of the said Establishment.

2ndly.—That this Court became inoperative prior to Mr. Caunter's dismissal by the aforesaid legally authorized change in the local Government, abolishing the Executive Offices, of which the holders are constituted by Charter, Judges *ex-officio*, and that during the absence of Sir John Thomas Claridge, then Recorder, there was no person within the said Settlements qualified, under the wording of the Charter, to fill the office of Judge.

Caunter, opposed the application, on the ground that the defendants had submitted to the Judgment of the Court by paying the amount and costs decreed, even without his suing out execution, and such voluntary payment should debar them now from the right of appeal. He submitted also, that the defendants had catitly acknowledged his right to continue in office until duly notified by the Court of Directors to quit, by causing a notification to that purport to be delivered to him through their agents in Penang, even after judgment had been pronounced in his case.

Balhetchet for the defendants claimed the benefit of the Charter which made no allusion to the practice of any Courts, but secured the right claimed, if petitioned for within six months from the date of the judgment. With respect to the plaintiff's second

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ground, he contended, that it could in no way militate against the appeal, and was but a precautionary measure, well advised to meet the possibility of an unfavorable judgment.

Malkin, R. was of opinion that Mr. Balhetchet had taken a correct view of the intention of the Charter which, by granting so long a period as six months, seemed to contemplate the absence in these Settlements of professional advisers, and to afford sufficient time for suitors who thought themselves aggrieved by this Court's judgment, to obtain professional opinions from the Presidencies, before venturing on the expensive process of an appeal. His Lordship could not view Mr. Caunter's second reason as interfering in any way with the right claimed, and sitting in this Court as the only professional judge, he should be at all times diffident of offering or encouraging objections to an appeal from his decisions, whenever parties considering themselves aggrieved thereby, exhibited any reasonable grounds for appealing, but more especially when they had been able to obtain professional advice.

The application was granted, on the Defendants' Agent guaranteeing payment of Plaintiff's costs, should the appeal prove unsuccessful. [a]

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Dec. 19.

The Plaintiff bought 158 slabs of tin of the Defendant, and at the time noticed that 137 slabs bore the chop of the Defendant's firm, but the remaining 21 bore the chop of another firm—and so remarked to the Defendant. The Defendant in reply said, "all the tin that goes out of my shop is good." The Plaintiff took delivery of the tin, paid the full price for the 158 slabs, and conveyed the same to Singapore. There he discovered that the 21 slabs were spurious, being a mixture of tin, and other inferior metal. He brought the slabs, or such portion thereof as had not been resmelted at Singapore, to Penang, and claimed of the Defendant, a return of his purchase money in full, as for a breach of warranty. The Defendant, having satisfied himself that the 21 slabs were spurious, tendered the Plaintiff the price paid for same, which the Plaintiff declined to receive, and commenced this action.

Held, 1stly, the words "all the tin that goes out of my shop is good," amounted to an express warranty that the tin was pure and merchantable; and 2ndly, that the warranty was general, and applied to the whole 581 slabs; and being entire, though it only partially failed, the Plaintiff was entitled to recover back the whole of his purchase money.

General observations on warranties, in commercial matters.

The facts and points in this case fully appear in the judgment and call for no recapitulation.

Balhetchet, for plaintiffs.

Caunter, for defendants.

Norris R. This is an action of assumpsit founded on an alleged breach of warranty; and the plaintiffs seek to recover back the purchase money paid by them to the defendants for 158

[a] No traces can be found, that the Appeal was ever prosecuted.

blocks of tin, great part of which has turned out to be spurious and unmerchantable, as well as the expenses incurred in taking the tin to Singapore, and bringing it back on its proving to be unsaleable.

It appears, that about two months ago, one of the plaintiffs, who are partners, went to the godowns of the defendants, also partners, trading under the firm of *Ti Ho*, and purchased the 158 blocks of tin in question for upwards of \$1,500; that at the time of making the purchase the plaintiff remarked to the defendants, who were all present, that the blocks were not all stamped with the same *chop*, or mark, 21, it seems, bearing the chop of *Hoon Chiang*, and the remaining 137 that of *Ti Ho*, the defendant's house; whereupon the first defendant observed: "All the tin that goes out of my shop is good," an observation which was understood by the witness to apply to the one chop as well as the other.

The plaintiffs satisfied with this assurance, shortly afterwards paid the full price agreed upon, and took the tin to Singapore for sale. There was no outward defect in the blocks, nor anything in their appearance to excite suspicion, nor is it pretended that the defendants practiced any deceit, or had any knowledge or suspicion of the latent defect which was afterwards discovered in the 21 blocks bearing the chop of *Hoon Chiang*. On arriving at Singapore the plaintiffs sold the whole 158 blocks to Messrs. Kerr, Ranson & Co. What passed between them on the occasion does not appear, nor is it very material to enquire; but, as a measure of precaution, the purchasers proceeded to resmelt a portion of the tin, selecting indiscriminately for that purpose nearly a third of the whole, which they melted down in one and the same furnace. The molten mass, consisting, as it happened, of 47 blocks of the *Ti Ho* and only 2 of the other chop, appeared to be a mixture of pure tin with lead, speltre, and other base materials; and the whole quantity purchased was, in consequence, returned upon the hands of the plaintiffs, who lost no time in bringing back the remaining 109 blocks to Penang, giving notice to the defendants and requiring them to repay the purchase money. The latter, however, refused to comply, persisting in their original assurance that the whole of the tin was good; but on being pressed by the plaintiffs, at length proposed that 12 blocks of each chop should be separately resmelted before a committee of respectable merchants. This was accordingly done, and a certificate has been put in, by consent, signed by Messrs. Anderson, Tanner, Revely, Scott and Stuart, expressing their "decided opinion that the tin of the chop *Ti Ho* is "fine, merchantable and pure, and that of the chop *Hoon Chiang* impure, being mixed with much dross and inferior "metal." The defendants subsequently offered by way of compromise, to pay \$247, the estimated value of the 21 defective blocks, supposing them to have been pure and merchantable, together with the expenses incurred in conveying them to and from Singapore; which offer the plaintiffs rejected, considering themselves entitled to recover back the whole of the purchase money and not merely a part. And this is the question which the Court is now

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called upon to decide; to determine which, it must, in the first instance, be ascertained—whether any *warranty*, express or implied, was given by the defendants to the plaintiffs, at the time of the sale—and, if any, to *what extent*. Now, as to the first point, it is clear to my mind, that the words used by the first defendant on that occasion, “All the tin that goes out of my shop is good” amount to an *express warranty* that the tin in question was pure and merchantable. I am aware that, in some of the older cases, a distinction is taken between an express warranty and words of mere *affirmation*; and it may be objected that the words in question amounted at the utmost to a general assertion only, and not to a special warranty of the particular goods. But the distinction has been long since overruled, and [as observed by Mr. Justice Buller, in *Parley v. Freeman*, 3 T. R. 57] “every affirmation at the time of a sale is a warranty, provided it appear in evidence to have been so intended.” On the sale of a horse, the vendor’s answer “yes” to the purchaser’s enquiry, “Is he free from vice?” constitutes a warranty to that extent; [*Helyear v. Hawke*, 5 Esp. Rep. 72] so also, the vendor’s general assurance, “you may depend on our supplying you well,” [*Jones v. Bright*, 1 Dawson, and Lloyd 304]; and numberless similar instances might be quoted. In the present case, the defendant’s words were in answer to the implied doubts expressed by the plaintiffs, and were unquestionably intended and relied upon as a warranty. As to the second point, I am equally clear, from the generality of the defendant’s expressions, “All the tin,” &c. and the manner in which they were elicited by the plaintiff’s previous remark, that the warranty was meant, as it was understood, to be *general*, and not restricted merely to the defendant’s own chop. The warranty then being general, it cannot, in legal reasoning, be alleged that, inasmuch as the failure has been only partial, the defendants are only partially liable; for it is an established principle, that an entire contract cannot, without mutual consent, be split or apportioned to suit the convenience of one party at the expense of the other. As, in the first instance, the defendants could not have sued for any part of the purchase money until the whole quantity of the tin contracted for had been delivered [*Waddington v. Oliver*, 2 N. R. 61, *Walker v. Dixon*, 2 Stark, 281] so neither can he now insist that the contract is satisfied by a partial or mixed performance, *viz.*: the delivery of 137 blocks, instead of 158, and a return of price for the residue. Such an arrangement may not answer the plaintiffs’ purpose, and, whether or not, they have a right to insist on the full performance, or damages for the non-performance of the defendants’ contract. I am of opinion, therefore, that the defendants are liable to the plaintiffs for the full amount of the purchase money, with the cost of the action, and the expenses of conveying the tin to and from Singapore, and resmelting portions of it there and here. These expenses, from the evidence before me, I estimate at \$40; from which, however, must be deducted \$12 the estimated expense of bringing back from Singapore the portion there melted down, and which the plaintiffs might, for aught that appears, have brought away with the residue.

It may seem hard upon the defendants that they should be forced to bear the loss resulting from the adulteration of their 47 blocks of good tin by the admixture of the 2 blocks from the bad chop, which were, somewhat inconsiderately, thrown into the same furnace by the purchasers at Singapore. But it should be recollected, that the defendants have, or ought to have, their remedy over against the manufacturer by whom, to all appearance, they have been so fraudulently dealt with; and that they have to blame their own want of caution in giving a *general* warranty, and thus leading purchasers to infer, that if suspicion attached to any portion of the tin, it equally attached to all. Had the defendants contented themselves with saying "We can warrant our own chop," and for the other we *believe* it to be good and merchantable," the purchasers, perhaps, with equal discrimination, would have applied the test to the latter alone or, at most, have separately examined 1 or 2 blocks of each chop, the warranted and the unwarranted; the different qualities of which, without some such previous hint, they could scarcely have been expected to guess—I say *unwarranted*, because as, on the one hand, the mere utterance of an opinion or belief certainly is not a warranty, so, on the other, I have many doubts, whether, under such circumstances, a warranty of the 21 blocks could have been *implied* in law. And were it not for these doubts, and that it may be useful to mention whence they arise, I should scarcely feel called upon, in a case of *express* warranty like the present, to advert to the subject of *implied* warranties at all. It is true that in the case of *Jones v. Bright* [1 Dawson and Lloyd's Rep: 304] the Court of Common Pleas decided that where a *manufacturer* sells goods expressly for a *particular purpose* [viz.: copper sheaths to copper a particular vessel] there is an *implied* warranty that the article shall be reasonably fit for that purpose, or, at all events, against latent defects arising from a want of skill or care in the process of manufacturing. But the present case is distinguishable from that in two respects; for in the first place, the plaintiffs did not mention that the tin was wanted for any specific purpose,—and secondly, the defective portion was not of the defendants' own manufacture. It is true also that in the previous case of *Gray v. Cox* [4 B. and C. 108] which was likewise a case of defective copper sheathing, and more nearly resembled the present inasmuch as the seller was not the manufacturer and no specific purposes mentioned by the buyer, Lord Tenterden expressed a strong opinion to the same effect, and that his opinion was referred to with approbation by the Court of Common Pleas in the above cause of *Jones v. Bright*. But this *dictum* of Lord Tenterden was not sanctioned by the other Judges in *Gray v. Cox*, and although a similar opinion was expressed by Lord Ellenborough in the still earlier case of *Bluet v. Osborne and another* [1 Stark. 384], the soundness of the doctrine, as a general rule, was doubted at the time, and has since been much questioned. It is scarcely reconcilable with the principles laid down in *Parkinson v. Lee* [2 East. 314], a leading case upon the subject; and is certainly an encroachment upon the old maxim of *caveat emptor*, by which a person

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who personally inspects a commodity and chooses to purchase it in reliance upon his own judgment, and without asking for the protection of a special warranty, is generally understood to take upon himself the risk of any latent defects which may subsequently be discovered in the article sold. Formerly, indeed, it was supposed that in the conditions of all sales there is an implied warranty of the goodness of the article; and that what was termed a *sound price* was of itself an implication of warranty. But it has long been settled that this is not the law of England, however agreeable it may be to the genius of the Civil Law; by which certainly the seller is in general answerable for *all* latent defects, however innocent or ignorant he may be of their existence, and is bound moreover to make known at the time of sale all such latent defects as may be within his knowledge. These maxims have been upheld by Grotius, Puffendorf, Paley and other great moral writers, as more consonant to the principles of natural justice and equity than the doctrine of the English law, but there are not wanting powerful arguments in support of our own system as better adapted to the circumstances of a great commercial people. It should be remembered, also, that while the English law in general justifies the vendor's *silence* with regard to the defects of an article which is fairly open to the buyer's inspection, it affords no protection whatever to deceit, misrepresentation or *fraudulent* concealment. And in contracts of manufacture, where goods are directed to be *made or supplied*, and where, therefore, the buyer is necessarily dependant upon the honesty and good faith of the manufacturer, the law *implies* a warranty that the articles shall be good and merchantable. In some cases also, an implied warranty arises from understood *custom* in particular trades, but then the custom must be established by clear and satisfactory evidence. In the present case, certainly, according to the evidence of Mr. Charles Scott, the manufacturer's *chop* is generally looked upon as a sufficient implied warranty; but Mr. Scott added that a *special* warranty was frequently taken, which shews that the *custom* of the trade, if it exists at all, is not very generally understood or acted upon. Upon the whole I should recommend that in all cases where the buyer has any doubts with regard to the soundness of the article or the custom of the trade, he should require a special warranty; and that if the contract of sale be in *writing*, the warranty be also inserted in and form a part of it, for otherwise it cannot be received in evidence, since a Court of Justice can only look to the written contract, and not suffer its contents to be varied by parole evidence of something else which took place at the time when it was entered into.

Judgment for plaintiffs as above with costs.

Balhetset for the plaintiffs stated that as the defendants could not conveniently be put in possession of the tin which had been melted down and left at Singapore, his clients were willing to take that portion at the average price of \$20½ per picul, in anticipation of which, indeed, they had, as appeared on reference to the petition, limited their claims for damages to the sum of \$1,300.

Caunter, for the defendants, assented to this, [without prejudice, however, to his right to move for a new trial, should it be thought advisable to do so] and the judgment was qualified accordingly.

December 24. *Caunter*, on behalf of the defendants, moved for a rule calling on the plaintiffs to shew cause, why a new trial should not be had, on the grounds, 1st, of certain papers, which he submitted told in his favour, but which were produced by the plaintiffs—had been adduced in evidence, without being translated, so as to enable the Court to judge of the nature thereof, the nature of these documents were set out in the affidavit on which he moved, and 2ndly, that a certain witness, Kho Tay Chah, who proved the warranty, gave his evidence in Malay, a language which the defendants were very imperfectly acquainted with, so they did not understand the nature of the evidence, and could not and did not therefore, instruct their lawyer, to call witnesses to contradict it, as they were in a position to do, and gave some names.

The Court refused to grant a rule.

MORAISS AND OTHERS v. DE SOUZA.

From the time of the introduction of the Charter of 1807, up to the date Act XX of 1837 came into operation, the English law of Inheritance was the law of this Colony.

Rodyk v. Williamson and *In the Goods of Abdullah* [a] approved of.

Act XX of 1837 is retrospective, except as to existing interests which come within the provisos thereof. [b]

Where therefore the defendant's ancestor held lands at Malacca under a Dutch grant, which had been lost, and the original entries in the Dutch records were not to be found—but, after the English had taken Malacca, in an agreement made in 1828 between the English authorities and the defendant's ancestor, "the grants issued by the preceding Local Government in 1781 and 1788" were expressly recognized,—undisputed acts of ownership by the defendant's ancestor distinctly recited and a covenant made by the English authorities with the defendant's ancestors "and his heirs for ever, so long as the Settlement of Malacca remains under the British Flag,"

Held, in the absence of evidence to the contrary, that there was a presumption that the original grants were in the nature of a fee simple; that the ancestor having died before 1837, the lands passed to the defendant as his heir, and fell within the proviso of the Act XX of 1837, as a transmission according to the rules, which regulate freehold property.

This was a suit for the administration of the estate of the deceased M. F. De Souza. The facts and questions arising, sufficiently appear in the judgment.

Cur. Adv. Vult.

On this day judgment was delivered by

Norris, R. This was a suit by the younger children of the intestate to obtain a discovery, account and distribution of the estate, from their elder brother, the administrator, who also claims as heir to the real property left by the deceased, and which

[a] *see* Ecclesiastical Cases, Vol. II. of these Reports.

[b] *see* *In the Goods of William Caunter, deceased*, Ecclesiastical Cases, Vol. II. of these Reports.

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is particularized at the foot of the inventory. It was attempted to be shewn, as alleged in the bill, that the defendant, in combination with others had succeeded, by artful impediments and delays, in defeating the original intention of his father to divide his property by will in equal portions among all his children; and that the defendant had moreover, since the death of his father, continued to quiet the complaints of his brother and sisters by promises which had never been fulfilled, that such equal division should still be made. But the evidence on both those points, as I have already intimated, was far too vague and unsatisfactory, not to say suspicious, to be deserving of any attention. Great pains were also taken, but with equally bad success, to shew that the inventory rendered by the defendant was in various respects untrue and incomplete. On this point also I have already expressed my opinion, and see no reason to change it, that the inventory has been substantially verified. The imputations unsparingly cast upon the character of the defendant for his alleged rapacity and desire to secure his own interests at the expense of impoverishing the rest of the family, have in like manner proved to be without foundation; on the contrary, I feel satisfied, from the evidence adduced on his behalf, that he has really deserved the character ascribed to him by one of the plaintiff's own witnesses, *viz.*: that of having been, for many years prior to the death of the intestate [who had long been superannuated and incapable of active exertion], a protector, supporter and father to the family. With regard to the principal item on the debit side of the defendant's account with the estate, *viz.*: \$433.75, for a bond given by the intestate to James Lewis, deceased, and which the defendant has been compelled to pay to the administrator of that estate, it is insisted for the plaintiffs that the estate of their deceased father can only be liable for one half the amount, and the evidence on which the defendant grounds his claim upon the estate for the whole is certainly not so satisfactory as could be wished, owing to the bond having, as he says, been destroyed by his father when given up on the discharge of the debt. In the accounts of Lewis's estate it is described as the *joint* bond of M. F. and J. M. De Souza, and so also in the endorsement in the remaining blank half of the sheet on which the bond was written, and which the defendant says he preserved as a memorandum for his own security. But on the other hand, Mr. B. Rodyk, agent for the administrator of that estate, has sworn that, although he has no precise recollection of the terms of the bond, he never thought of calling upon the defendant for the debt until after many fruitless applications to his father the deceased; whilst the defendant himself, on the immediate challenge of the plaintiff's agent, who pressed this appeal to conscience in a tone of much defiance, has solemnly sworn that he became a party to the bond, not as a principal but only as security for his father. Under these circumstances, I cannot, in the absence of any conclusive evidence to the contrary, refuse to give credit to the defendant's solemn asseveration, which must be taken as a part of his sworn answer to the bill of

discovery and entitled in a Court of Equity to the same degree of consideration. It remains for me to notice the arguments adduced by the plaintiff's agent, in opposition to the defendant's claim as heir to the landed property of the deceased. It was contended, in the first place, that the English law of inheritance has never prevailed in these Settlements, and that, at Malacca, property has always descended according to the rules of the Dutch law. But although "*in practice*," as is generally known, and stands admitted in the preamble to the Indian Act No. XX of 1837, the "rules of English law have been little regarded by a great part of the population;" yet with respect to the *Law* itself, as it stood from the introduction of the Charter up to the 1st October last, it is all but declared in express terms in the same preamble, that "within these Settlements land can be lawfully bequeathed and inherited only according to the rules of "English law."

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The question, indeed, had already, I conceive, been formally decided, in principle, by my learned and lamented predecessor, Sir Benjamin Malkin, in two cases, which came before him. The first was the case of *Rodyk v. Williamson*, in May 1834, wherein the rights of a Dutch widow, were held to be those of a widow according to the English Law, not the Dutch Law formerly received at Malacca [a]. The other was a case with reference to the will of a Mahometan, *Abdullah*, in March 1835, [b] wherein the former case was adverted to, and the principles of the decision so fully and clearly explained in a luminous judgment, recorded at length with the proceedings, that it is needless for me to do more than refer to it, concurring as I do entirely in the principles there laid down. But even admitting, it was said, for argument's sake, that it may at one time have been correctly holden that landed property in these Settlements such as would be called free-hold in England, was subject to the English law of inheritance, still the position is *now*, in 1838, no longer tenable, inasmuch as the Indian Act above referred to, has a *retrospective* as well as prospective operation, and enacts "that *from the first day of "October 1837*, all immoveable property, situated within the "jurisdiction of this Court, shall, as far as regards the transmission of such property on the death and intestacy of any "person, &c;" "or by the last will of any such person be taken "to be and *to have been* of the nature of chattels real and *not* of "freehold." This, I said, as a general position, was undeniable, but the argument to be of any avail must be carried further and explain away, if it could, the important provisoes of the Act in favor of existing interests, and without which provisoes indeed, it would have been an *ex-post facto* law of the most tyrannical description. One of these, it would be observed, expressly saves

[a] Sir Benjamin Malkin alludes to this case [*Rodyk v. Williamson*] in a letter addressed by him to the Government of India in 1837—see *Report of Indian Law Commissioners*, 1843, p. 86; and on application made to the Registrar in 1846 for "a Copy of the Judgment," by the widow of the Defendant, it is recorded that it could not be found.—J. W. N. K.

[b] See *In the Goods of Abdullah, deceased*, Ecclesiastical Cases, Vol. II. of these Reports. *ps*

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titles "arising out of a transmission, upon the death and "intestacy of any person, of such transmission were according to "the rules which regulate the transmission of *free-hold* property, "and took place *before* the said first day of October." It was then contended that the tenure of these lands did *not* in truth amount, by the terms of the grants, to a free-hold interest, and consequently that they *could* not have passed or been transmitted, "according to the rules" in question, to the defendant as heir at law, but must be considered as chattels real, and part of the personal estate in his hands as administrator for the general benefit of the next of kin.

What were the precise terms of the original grants by the Dutch Government it is impossible now to ascertain, as it appears that they are no longer in existence, and the references made to them in the subsequent deeds of transfer are too loosely worded to lead to any certain conclusion on that head; whilst the original entries in the Dutch records are not to be found. But the terms of the agreement entered into by the present Government with the deceased in the year 1828, in which the "*grants* issued by the preceding Local Government" in 1781, and 1788, are expressly recognized,—undisputed acts of ownership, by himself and those through whom he claimed, during the long intervening period, distinctly recited,—and a covenant made with him "and *his heirs for ever*, so long as the Settlement of Malacca remains under the British flag;" these terms, I say, are sufficient, in the absence of evidence to the contrary, to warrant the presumption that the original grants were in the nature of a fee-simple; and the annuity payable by the Government under the agreement in question must be regarded in the same light and as descendible to the heir. The last point urged was, that, even supposing the lands to have been freehold, a *complete* "transmission" to the defendant as heir, "according to the rules" in question, had not only *not* "taken place before the said first day of October," but was even yet wanting, inasmuch as the defendant had not perfected his title by a formal *entry* upon and taking *possession* of the lands, as required by the rules of the English common law. This objection, however, [not to mention that, even were it good for anything, the plaintiffs would be *estopped* from urging it by the very terms of their bill, which complains of the defendant's having "entered and possessed himself," &c., &c.] proceeds altogether on a mistake. The heir becomes possessed in contemplation of law without any act of his own; and his actual *seisin*, whether by formal or constructive entry, though material for the purpose of preserving the descendible quality of the estate and enabling him, in his turn, to become the *stock* or root to *future* heirs according to the legal maxim [founded on feudal principles, which I need not stop to explain] *seisina facit stipitem*, is by no means necessary for the completion of his title as against the personal representatives of his ancestor.

The result of the whole is that the defendant is clearly entitled to judgment with costs, to be paid out of the estate. The \$662.73, which he was directed to pay into the hands of

the receiver appointed by the Court, whilst the question was pending, will also be repaid to the defendant, and his claim for interest on that amount during the *interim* cannot be resisted. He was not bound, and could not be supposed to have ready in hand, to meet the unexpected and peremptory demand of the plaintiffs, so large a sum claimed by them as assets belonging to the general estate, but which, being parcel of the rental or annuity payable by the Government, clearly belonged to himself as heir to the landed property. He must therefore be allowed to reimburse himself for the amount of interest due on this sum, at the usual rate, out of any of the personal estate or assets which may yet remain in his hands undistributed.

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EDWARDS v. WESTERHOUT.

The plaintiff, the Editor of a Weekly Paper, sued the defendant, the Deputy Postmaster of Malacca, in trover, for the detention of certain journals and parcels addressed to him as such Editor. The defendant pleaded and proved, that he detained such letters and parcels by order of the Resident Councillor, until the person to whom they were addressed, declared in writing, the name of such Editor.

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Held, the defendant was justified in so detaining the journals and parcels.

The defendant was aware the plaintiff was the Editor of such paper, and had always, theretofore, forwarded him all letters and parcels addressed to the "Editor," and was present, in company with the Resident Councillor, on a previous occasion, when the plaintiff in open Court, avowed himself the Editor.

Held, these facts in no way deprived the defendant of his justification.

This was an action on the case, for trover and conversion of the plaintiff's property.

It appeared that in August, 1839, the defendant, who had charge of the Post Office, received a note from the Resident Councillor of Malacca, desiring, that all communications arriving at the Post Office, directed to the Editor of the *Weekly Register*, should be detained, unless that person came forward and declared in writing the name of the Editor of that journal, in pursuance of which, the defendant thought himself justified in detaining all the journals to that address, which came into his possession. The damages were laid at 50 Spanish Dollars. Plea—the General Issue.

The plaintiff called no witnesses, but stated the fact of the defendant having transmitted to him, all papers, letters, and other communications arriving from sea to the address of the Editor of that journal, up to the date on which the packets in question were first detained; and, therefore, could not have been ignorant of the person and name of the Editor; and the same practice, he observed, had obtained in the time of his predecessor, the late Deputy Postmaster. He also proved the circumstance of his having avowed himself the Editor in open Court on the 9th September, while the packets, &c., were so detained, and that the Postmaster and the Resident Councillor were presiding on the bench as Magistrates, and had ordered a register of the avowal to be made in the minute book.

The defendant did not deny the facts as stated by the plaintiff, but pleaded in justification the orders of the Resident

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Councillor; and handed in two notes from that authority—one, desiring the stoppage as above set forth; the other, ordering the delivery of the detained packets on the 16th September.

The plaintiff called the attention of the Court to the Act of the Indian Legislative Council regulating the publishing of periodicals and other publications [a]; and to the then recent Post Office Act [b], which would clearly establish the fact, that the Resident Councillor could not interfere with the Post Office Department.

Norris, R. The question for the consideration of the Court I take it to be, was the defendant justified, under the orders he has satisfactorily proved to have received from the Resident Councillor, in detaining the packets addressed to the Editor of the *Weekly Register*, until he had been satisfied, in the manner required, of the name of the Editor? I am clearly of opinion he was; and could not have delivered them until his instructions had been complied with. The circumstance of the avowal in open Court, as proved by the plaintiff, goes for nothing in my estimation, as that was not a compliance with the terms of the order. With respect to the legality of the order, I consider that a question with which I have nothing to do; nor can I allow the subject to be mooted in this action. But as the plaintiff has declared, that his object is not to seek damages, but to settle the principle involved therein, and as the Resident Councillor has stated his intention to prevent the recurrence of what the plaintiff complains; I think the plaintiff cannot recover.

Judgment for the defendant, each party paying his own costs.

REVELY & CO. v. KAM KONG GAY AND ANOTHER.

PENANG.

The Statute of Frauds, 29 Car. II., c. 3, is law in this Colony.

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Where goods are agreed to be sold, but no memorandum of the sale, is had, or part payment of money is made,—the mere fact that the goods, not weighed or measured, is left by the defendant, with the plaintiff simply for his [the defendant's] own convenience, and on the bills for their value being presented, promised to pay it in a few days,—do not constitute “an acceptance and receipt of the goods, or part thereof,” within section 17 of the Statute.

The facts giving rise to this case, and the nature of the questions discussed, are fully set forth in the judgment.

Balhetchet, for plaintiffs.

C. Baumgarten, for defendants.

Judgment having been given at the hearing for the defendants, a more formal and written judgment was this day delivered by

Norris, R. This was an action to recover the sum of 252 Dollars for goods bargained and sold to the defendants, who pleaded first the general issue, and secondly, “that the supposed contract was an entire contract for the sale of goods for a price exceeding £10 sterling, and that the defendants had not ac-

[a] Act 11 of 1835.

[b] Act 17 of 1837.

"cepted and actually received the said goods or any part thereof, nor given anything as earnest to bind the bargain or in part payment, nor was there any note or memorandum of the bargain in writing signed by the defendants or their agents:"—the plea being founded on the 17th section of the Statute of Frauds, 29 Car. 2 C. 23.

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Mr. Balhetchet, the agent for the plaintiff's stated the goods in question were 10 hhd. of arrack, containing, as was alleged, 630 gallons, which the defendants had agreed to purchase from the plaintiffs at the rate of 40 cents per gallon, making 252 dollars, the amount sued for and which is equal to between £50 and £60 sterling. He admitted that there was no note or memorandum of the bargain in writing, and that nothing had been given by the defendants by way of earnest or in part payment; but he contended that there had been sufficient *receipt and acceptance* on the part of the defendants to take the case out of the Statute; for he was prepared to shew that the defendants, after having made the bargain, had, merely to suit their own convenience, requested that the arrack might be allowed to remain for a while at the plaintiff's godowns, and that when the bill of parcels was presented for payment the defendants had promised to pay it in a couple of days. It was true the arrack had not been actually measured and was still in the possession of the plaintiffs; but he contended that under the circumstances stated, the right of property must be considered to have passed and the goods to have been constructively delivered to the defendants, within the meaning of the Statute. These facts being admitted to constitute the plaintiffs' case, I considered it needless to hear any evidence upon the subject, because, taking the facts for granted, (and they were not disputed on the other side), they were insufficient in my opinion, to take the case out of the Statute. Accordingly, after noticing the cases cited and the arguments urged by Mr. Baumgarten for the defendants and Mr. Balhetchet for the plaintiffs, and making a few observations on the beneficial nature of the Statute and the danger of allowing its salutary provisions to be frittered away by subtle distinctions, I gave judgment for the defendants with costs. I see no reason as yet to doubt the correctness of the conclusion to which I came, nor does the case appear to me intrinsically remarkable enough to call for any lengthened notice. But as the plaintiffs' agent has suggested that a more formal and detailed judgment may be generally useful, inasmuch as the law in such cases, however well settled in England, is but little known to the mercantile community, whether native or European, in these Settlements, whilst it is certain that the Statute is but little regarded in practice and has not often been pleaded in this Court, I will re-state the grounds of my decision. In so doing, however, I am anxious to guard against any supposed acquiescence in what the suggestion would in some measure seem to imply, and what on other occasions I have heard contended for in direct terms, viz., that allowance must be made for local habits of business and local ignorance of English law. With regard to the former, it may be

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sufficient for me to remark, that I entirely concur in the sentiments expressed by my able predecessor, Sir B. Malkin, who, in reference to "the lax practice" of a sister Settlement, observes as follows: "A custom of Singapore" to transact ordinary mercantile business "in an irregular manner. Of course I did not recognise any such custom or treat men who had received their mercantile education in Great Britain or India as entitled to relieve themselves from the ordinary restraints of the regular conduct of business "by setting up any lax usage of so recent-introduction" [a]. Sir Benjamin instances the frequent question arising out of common mercantile transactions in bills of exchange, insurances and cases of salvage, in illustration of the serious injustice which might be done to parties *at a distance*, were the Court here to recognise any local usage at variance with the known "usage and custom of merchants" all over the world. And I am persuaded that any such concession, to say nothing of its illegality, would prove equally prejudicial to *local* interests, and so far from giving general satisfaction, would afford just grounds of complaint, which would not fail to be loudly urged when occasion called for it, even by those who had formerly advocated the mistaken indulgence. With respect to the plea of ignorance, it never has been, and, for the most obvious reason, never ought to be listened to. *Ignorantia legis non excusat* is a maxim of necessity, not peculiar to our own jurisprudence but derived from the Roman law, and probably recognised in the codes of all civilized nations; nor could the rule be relaxed in favour even of the most ignorant classes here without virtually casting the stigma of injustice upon the rigid observance of the same rule from the earliest ages as against the lower orders in our own country. But if ever there were a law, an ignorance or disregard of which among mercantile men were peculiarly undeserving of toleration, it surely is the justly commended Statute in question; because there is no law, perhaps, the wise provisions of which are more consonant to the dictates of ordinary prudence, regularity and fair dealing, or better calculated to insure the certainty and hence the security, and uphold the honour and respectability of mercantile contracts; particularly in the transactions of Europeans with natives, or of different classes of natives with one another. Cases of apparent hardship (and possibly the present may be one) will doubtless sometimes arise, in which it may be surmised that the Statute enables an unscrupulous defendant to triumph over conscience and good faith. But the objection can seldom be made with a good grace. It is an old and sound maxim, that *he who seeks equity must behave with equity*; and the obvious reply will generally be that the objector himself had not scrupled, by his disregard of the Statute, to reserve to himself the advantage of a similar plea, had he wished to repudiate the bargain. Besides, were the Statute likely to be pleaded much more frequently than it has hitherto been, could it be contended for a moment that the

[a] This will be found in a letter addressed by Sir Benj. Malkin to the Government of India in 1837. See *Report of Indian Law Commissioners*, 1843, p. 112.

occasional dissolution of a *bonâ fide* bargain was a greater evil than those so fearfully prevalent in these countries, and the occurrence of which in a large class of cases the Statute was expressly designated to prevent the "*many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury*" ? So thought not the great men and experienced lawyers, Sir *Mathew Hale*, Sir *F. North*, and Sir *Leonine Jenkins*, who are supposed to have drawn up this celebrated Statute; nor the long series of learned Judges who for nearly two centuries have concurred in enforcing its provisions; and it requires but a tithe of their experience in Courts of Justice to be convinced of the sound wisdom which led to the enactment and has ever since upheld it. If this Court, therefore, is resolved, as I hope it always will be, upon a rigid adherence to the Statute, whenever the benefit of its provisions may happen to be claimed, I can say, for myself at least, that the determination will not have arisen from any acquired partiality for legal trammels or from the slightest indisposition to waive unmeaning technicalities, [for few Courts enjoy or have exercised a larger discretion in this respect,] but from a thorough conviction of the justness, propriety and policy of upholding a law especially designed and calculated for the prevention of fraud and perjury and the encouragement of fair and honorable dealing among merchants.

With these preliminary observations which I need scarcely say have no especial reference to the parties in the present suit, I proceed to re-state the grounds of my decision in favor of the defendants, as shortly as I can consistently with the desire to render myself intelligible to those who are not in the habit of reading the reports of law cases. The 17th section of the Statute on which the plea is founded is as follows: "No contract for the sale of any goods, wares, and merchandizes, for the price of ten pounds or upwards, shall be good, except the buyer shall accept part of the goods so sold and actually receive the same; or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing, of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

Now the only question in the case is, whether under the circumstances stated by the agent of the plaintiffs as above, there was a sufficient actual or constructive *delivery* to and *acceptance* of the goods by the defendants, within the terms of the above section? And to decide this, it is hardly necessary to do more than to refer to one or two of the cases cited by the agent of the defendants. The first is that of *Howe v. Palmer* [3 B. & A. 321,] where the defendant verbally agreed at a public market with the agent of the plaintiff to purchase twelve bushels of tares [then in the plaintiff's possession and constituting part of a larger quantity in bulk] to remain in plaintiff's possession till called for, and the agent on his return home measured the twelve bushels and set them apart for the defendant. It was held that this did not amount to an acceptance by the latter; "for," said Lord *Tenterden* [then C. J.

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Abbott] "if he had once accepted he could not afterwards have made objection, even if it turned out that the tares did not correspond with the sample. But it is clear that he had a right to make any objection at the time when they were tendered to him for acceptance. If the defendant had discovered upon inspection that the tares did not correspond with the sample, it is impossible to say that he might not then have made the objection; and so far it is clear that there was no previous acceptance on his part." It was admitted by the agent of the plaintiff that the only difference in principle which he could perceive between this and the case of his clients arose from defendants' subsequent *promise to pay* the amount of the bill of parcels. There is, however, another point of difference between the two cases, to be presently noticed. But that a promise to pay would not at all have affected the principle of the above decision, is evident from a subsequent case to be found in the same volume. *Tempest v. Fitzgerald*, 3 B. & A. 680, and which in this respect more nearly resembles the present. In that case the defendant agreed to purchase a horse from the plaintiff for ready money and to take him within a time agreed upon. About the expiration of that time the defendant rode the horse and gave directions as to its treatment, &c., but requested that it might remain in the plaintiff's possession for a further time, at the expiration of which he promised to fetch it away and pay the price. It was contended for the plaintiff that the defendant's acts amounted to an acceptance and were acts of ownership. But Abbott C. J. in giving judgment, says, "I am of opinion that the defendant had no right of property in the horse till the price was paid." Bayley J. says, "If the argument of the plaintiff were to prevail, the defendant might have maintained an action for the horse without paying the price, which would be contrary to the express terms of the contract." and Holroyd J. says, "Admitting for the sake of argument that the property had been changed, still there is no evidence to shew that the plaintiff had ever parted with the possession or control, and if he had not, he had at all events a lien for the price, and the defendant could not be justified in taking it away until the price were paid." These cases appear to me to be quite decisive of the present, and could scarcely have been decided otherwise without a virtual repeal of this part of the Statute; the objects of which are very clearly explained by Lord Tenderden and Mr. Justice Holroyd in the above cases. "The Statute of Frauds," says the former, "is one of the most important and beneficial Statutes to be found in the books. One of its objects was to require *written testimony* or *memorials of contracts*, such as are acquired by the laws of most countries." And Mr. Justice Holroyd observes. "The object of the Statute was to remove all doubts as to the completion of the bargain, and it therefore requires some *clear and unequivocal acts* to be done in order to shew that the thing had ceased to be *in fieri*. Those acts are, either that the buyer shall accept part of the goods sold and receive the same, or give something in earnest or in part payment, or that the contract be reduced

"to writing. These are all acts that clearly and equivocally shew that the bargain is executed."

But the plaintiff's agent has referred me to the commentaries of a very learned American Jurist, Mr. Chancellor Kent, from which it is satisfactory to find that the provisions of our English Statute, with few modifications, obtain generally in the United States. I can find nothing, however, in that valuable work but what entirely coincides with the decisions of the learned Judges in England, which are constantly cited by the author in support of his positions. And the conclusion which he draws from the two cases abovementioned [after observing that "the case of *Elmore v. Stone*, 1 Taunt 458, has been since questioned, as carrying the doctrine of *constructive delivery* to the utmost verge of "safety,"] is as follows: "The *presumption of delivery* is not readily allowed, when there has been none in fact, for it goes to deprive the seller of the possession. and of his lien without payment."

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Again, he thus recognizes the principles laid down, not only in various decisions of the English Courts, but by Vinneous, Pothier and other commentators on the Civil Law: "If anything *remains to be done*, as between the seller and the buyer, before the goods are to be delivered, a present right of property does not attach in the buyer. This is a well established principle in the doctrine of sales. It is a fundamental principle pervading everywhere the doctrine of sales of chattels, that if the goods be sold by *number, weight or measure*, the sale is *incomplete* and the risk continues with the seller, until the specific property be *separated and identified*." In the present case, the arrack, as admitted, had not been gauged or measured which is the point above alluded to as constituting a further distinction between this case and that of *Howe v. Palmer*, and a distinction of course, still more adverse to the present claim.

The result is, that the defendants are clearly entitled to judgment with costs.

SULTAN OMAR AKAMODEN

v.

NAKODAH MAHOMED CASSIM.

The words in the Charter of 1826, defining the Civil Jurisdiction of the Court over "all pleas the causes of which shall or may thereafter arise against any persons who shall be resident within the Settlement," mean resident at the time of action brought, and not at time the cause of action arose.

Where therefore the defendant and plaintiff entered into a contract for the sale of certain chests of opium at Sumbas in Borneo where they were both resident at the time, but after the defendant had committed a breach there, they both came to this Settlement, where the plaintiff sued the defendant,

Held, this Court had jurisdiction to entertain the suit.

Where a Foreign Sovereign Prince sues in the Courts of this Colony, a person resident here, the Court in compelling the defendant to answer, will couple with the order, that the Sovereign Prince will submit to the jurisdiction, in case of a cross action, so that the remedies might be mutual.

The *Columbian Government v. Rothschild*, 1 Simon 84, followed.

The nature of the questions decided herein, and facts and

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NORRIS, R. pleadings giving rise thereto, sufficiently appears in the judgment.
 1841. The plaintiff in person.
 ——— Napier for defendant.

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v.
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Cur. Adv. Vult.

On this day judgement was delivered by

Norris, R. This is a Petition or Bill on the Equity side of the Court calling upon the defendant for a discovery to enable the plaintiff to recover damages for the breach of an alleged agreement by the defendant to supply him with 100 chests of opium; by the non-fulfilment of which agreement, it is averred, the plaintiff has been disabled from completing his own engagements as Opium Farmer to the Dutch Government at Sambas, in the island of Borneo, and thereby sustained a loss of 6,000 Guilders.

To this the defendant pleads, "that the Court has not jurisdiction in nor can hold plea of the matters in the said petition contained, and cannot take cognizance of the same, but that the same appertain to and are in the cognizance of the tribunals of Sambas in Borneo, in the said petition mentioned, and in which place the alleged matters are stated to have taken place; and the defendant further pleads, that although it appears by the said petition that the complainant at the time therein mentioned was Opium Farmer at Sambas in Borneo aforesaid, yet that in point of fact, the complainant was and is the Rajah or Sovereign of the State or Territory of Sambas aforesaid, which is and always has been his place of residence and that being a foreign Potentate, and not subject in person or effects to the jurisdiction of this Court, it is not competent for him to file his petition therein to compel this defendant to answer, where he has not any remedy by cross-bill or otherwise against the complainant."

On the strict principles of pleading, this plea would probably be held objectionable and bad for duplicity, as containing two distinct matters, each professing to be a complete bar to the action. But as this Court enjoys by its Charter a happy immunity from all needless technicalities, and is bound in all cases so to shape its proceedings as to attain substantial justice; as the objection to the plea, if available at all, could only have been properly taken advantage of by special demurrer, whereas the complainant has neither demurred nor replied, the question for present decision standing simply on the arguments of the respective Agents for and against the plea; and as it is but justice that the defendant should have his remedy, if required, by cross-bill or otherwise; I should have had no difficulty [independently of the authority cited by Mr. Napier, which is strictly in point. *The Columbian Government v. Rothschild*, 1 Sim. 84,] in accompanying an interlocutory decree for an answer to the petition or bill of complaint with a condition binding the complainant's representative, Syed Omar, who has already given security for costs, to appear and answer any cross-bill which may be filed against his constituent. So much as to the latter portion of the plea.

The former part raises a larger and more important question, for as observed by Sir Thomas Strange, [Notes of Cases, Vol. I., 155] "not to mention the nicety that often belongs to them, there are few questions of greater importance in Courts of Justice than questions of jurisdiction, there being few that eventually affect a greater number of future cases." The question is, whether, under the circumstances, the cause of action having confessedly arisen out of the local jurisdiction, the Court can take cognizance of the complaint? And the case of *Nakoda Mapey v. Nakoda Mourana*, decided by myself in this place, last December, is referred to by the defendant's Agent as a direct authority in the negative. But the features of that case, it is hardly necessary to observe, were materially different from those of the present. There, the demand was of 9 or 10 years standing, the defendant, a mere casual sojourner, and both parties inhabitants of the same Island, Celebes, if not of the same village where the cause of action arose, where they were both on the eve of returning, where there was a common tribunal to resort to, and where the witnesses on both sides were at hand. It may fairly be presumed, therefore, that in point of fact the ends of substantial justice were better secured by referring the parties to their own country and tribunal, than by consenting to entertain the enquiry here. In the present instance, on the contrary, the cause of action is of recent origin, and the defendant an old established resident, who is not likely, for aught that appears, to afford the complainant an opportunity of seeing him in Borneo; so that injustice might probably be done should the Court refuse to hear the complaint. But, can it do so consistently with the terms of the Charter, the cause of action having arisen out of the local jurisdiction? That is now the question and the sole one, for decision; for the question of actual or constructive inhabitancy, on which the decision in the former case in a great degree turned, does not arise in the case now before the Court.

The clause of the Charter, page 22, defining the personal jurisdiction of the Court over "all pleas the causes of which shall or may hereafter arise, &c., against any persons who shall be resident within the said Settlement, &c.," is certainly ambiguous; for it is not clear whether residents at the time of the contract or cause of action, residents at the time of the suit, or both these classes of residents are meant. *Prima facie*, however, the first class only would seem to be intended; for if *residence* were meant to be the sole test of jurisdiction, why advert to the "cause" of action at all, instead of simply adhering to the terms used in the Charters of H. M. Courts at the Presidencies, that is in the Bombay and Madras Charters respectively, and in that of Calcutta as explained by the Stat. 21 Geo. 3rd, c. 70, viz.: "All suits and actions against the *Inhabitants*." That the ordinary civil jurisdiction of the Straits Court was meant to be limited to contracts and other causes of action of local origin, would seem to be further inferrible from the terms employed in pages 9, 10 and 12 of the subsequent Charter of 1837, conferring Admiralty jurisdiction. In page 12 of this latter Charter, it is expressly provided that the jurisdiction

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of the Court, "in maritime causes" shall extend "only to such persons as, pursuant, to the provisions therein before contained, are and would be amenable to the said Court in its ordinary jurisdiction." Now the "provisions therein before contained," in that behalf, are those in pages 9 and 10, wherein the jurisdiction is limited to "causes civil and maritime, and all pleas of contracts, debts, &c., &c., contracted, done, had, or commenced in, upon, or by the sea or public rivers, or ports, creeks, harbours, &c., &c., without, throughout, and about the settlement of Prince of Wales' Island," &c. The indistinctness of the clause in the first Charter is, therefore, it should seem, cleared up by the more precise language of the latter, and the collation of both would appear to warrant the conclusion, that as is the Admiralty, so was the ordinary jurisdiction of the Court meant to be restricted to contracts and other causes of action arising within the local limits of the Settlement. This restricted operation of the Court's powers in the civil branch of its Admiralty jurisdiction [and by consequence, apparently, in its ordinary civil jurisdiction also,] is further manifest by contrast with the extensive powers immediately before conferred upon it in the same clause, pages 11 and 12, in its criminal jurisdiction, "to take cognizance of all crimes committed on the high seas by any person or persons whatsoever." And further still [according to the rule *exceptio probat regulam*] is this limitation of the civil jurisdiction made apparent by the terms of the Statute 2 Wm. IV., c. 51, s. 6, by which in certain cases therein mentioned, Vice-Admiralty Courts are declared to have jurisdiction, "notwithstanding the cause of action may have arisen out of the local limits of such Courts."

In addition to all this some decisions of the Supreme Court of Madras as reported by Sir Thomas Strange, appeared to furnish authoritative precedents for our declining here to exercise jurisdiction in cases analogous in some respects, though not in all, to that of *Nakoda Mapey v. Nakoda Mourana*, which as already observed, the Court refused to entertain last year. The cases in Sir T. Strange's reports to which I more particularly called attention to, are, those of *Nagapah Chitty v. Rachummah*, vol. I., page 152; and *Ram Narrain v. Nursiah*, vol. II., page 289. In the former of these, the Chief Justice, Sir T. Strange in delivering the opinion of the Court, remarked as follows:—

"It has been truly observed that it is impossible to argue "in this Court from analogous cases of jurisdiction in the Courts "at home; those Courts being by their constitution, according "to their respective modes and purposes of proceeding, the great "depositaries of the universal justice of the realm, and as such, "in every instance in which it is attempted to withdraw a case "from their cognizance, bound to see distinctly and unequivocally that a jurisdiction adequate to the object in view exists "elsewhere. If that be not stated, so as to appear to the Court, "a plea to the jurisdiction fails and the jurisdiction remains. "But here it is different, because though co-ordinate in its nature "with those Courts so far as its jurisdiction attaches, the jurisdiction of this Court is limited with regard to persons," &c., &c.

In the other case, the Court said: "they thought that *inhabitant* for the purpose of jurisdiction meant *resident* and that a constructive inhabitancy would not do . . . what a condition a stranger might find himself in, arrested suddenly for a large demand, not belonging to the place, but casually at it, being an inhabitant perhaps of the extreme point of the peninsula! How would he be able to find bail? Then as to his defence to the action; he might have to send for his witnesses to a most inconvenient distance,—in nineteen cases out of twenty he would not find them at Madras. Natives residing in the interior have no conception of the Supreme Court; they do not contract or carry on their dealings with reference to it. The Native residents do." If these passages do not expressly state, they at least strongly imply, that the legal maxim, *debitum et contractus sunt nullius loci*, ought, in the opinion of the Supreme Court of Madras, to be received in India with greater qualification than in England; and that inhabitancy alone would not be sufficient to ground jurisdiction where the contract or cause of action arose elsewhere and with reference to Tribunals.

I have thought it necessary to go thus much into detail, in order to explain clearly the grounds of my decision in the former case, and to avoid the appearance of inconsistency, now that I feel myself obliged, in deference to the weight of authorities to which I have since had access [and which being of very recent publication were necessarily unknown to me before] to decide somewhat differently in the present instance; though, had the question depended simply on the construction of our own Charters without reference to the earlier Charters of the Supreme Courts at the Presidencies, I should still have thought there was at least room for the doubt whether the Court could properly take cognizance of the present suit. The chief authority to which I refer is the case of *Madoo Wissenauth v. Ballo Gunnasett* reported in pages 149 to 158 of a Volume of Decisions of the Supreme Court at Calcutta, published a few months ago by Mr. Morton, a Barrister of that Court. The case in question, which is appended by way of note to other decisions on questions of jurisdiction at Calcutta, was decided in the Recorder's Court at Bombay so long ago as January 1818, by the then Recorder, Sir Alexander Anstruther, from whose manuscript notes it is now apparently published for the first time. And, as the reporter informs us in an appendix at the end of the volume, "the doctrines contained in this able judgment appearing to have been regarded by the local Government as dangerous innovations unauthorized by law," references upon the subject were in consequence made to the Advocates General, Maclin and Spankie, and to the Counsel of the Court of Directors, Mr. Serjeant (now Justice) Bosanquet; whose opinions are also reported at length and appear fully to concur with those expressed by Sir A. Anstruther. The learned Judge, in his very luminous judgment, expressed his "perfect acquiescence in the decision of most of the cases upon the subject in Sir Thomas Strange's notes at Madras;" but he dissents from one of them, thinks another questionable, and dissents also from "some of the

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"reasoning which the Judges appear to have employed in support-
ing them." I have already quoted the observations of the Court
at Madras with reference to the argument from analogous cases
of jurisdiction in the Courts at home. On this subject, Sir A.
Anstruther remarks as follows, "a foreigner arriving in England
for whatever purposes, in time of peace, is immediately answer-
able in the Courts of the Country for all claims of personal
contract *wherever arising*, and there must be some direct and
clear words to shew that the Court of the Recorder of Bombay,
which is expressly declared to have in general all authority
which the Courts of Westminster Hall have in England, shall
not be able to hold jurisdiction over an Arab or Mahratta in
Bombay, under the same circumstances in which the Courts at
Westminster would hold jurisdiction over a Frenchman or a
German." He admits, however, the ambiguity of the Statute
and Charter of 1797, which leave it doubtful [as in our own
Charter] whether inhabitaney at the time of the contract or of the
suit, or of both, is to be the test of jurisdiction. But in determin-
ing this question he possessed an advantage which this Court has
not, and of which he naturally availed himself, viz., the language
of *prior* Charters "as explaining the meaning of the Statute and
of the new Charter granted upon the same subject." He refers
accordingly to the first Charter, 13 Geo. I., establishing the Mayor's
Courts in 1726, and giving jurisdiction over all persons "residing
or being in" each Presidency, either "then," [*i.e.*, at the time of
the complaint or action brought] or "at the time when such
cause of action did or shall accrue." The second Charter, that of
Geo. II., in 1753, "retained," he observes, "in favour," of Euro-
peans, the same jurisdiction over inhabitants of Bombay, either
"at the time of contract or cause of action, or at the time of the
action being commenced . . . The Statute and Charter of 1797
are to be construed by those *former* Charters when they are
otherwise ambiguous . . . The Statute and new Charter do
not introduce any limitation of the jurisdiction to inhabitants
at the time of the suit brought, in exclusion of the inhabitants
at the time of the cause of action accruing, but use terms which
certainly may include both those classes of inhabitants; and
the former class seem to have been more peculiarly in contem-
plation, not only from the former Charters but from those parts
of them which are retained in the new Charter. The new
Charter of 1797 expressly retained to the Recorder's Court all
jurisdiction which existed in the Mayor's." He therefore held
it to be "clear that one, who was inhabitant of Bombay at the
time of the commencement of the suit is liable to the jurisdic-
tion." He then examined the question whether any particular
duration of time is necessary to constitute inhabitaney or resi-
dence for the purposes of jurisdiction; but as that point is not at
issue in the present case, it is needless to enter upon it here.
This construction of the Bombay Charters is entirely confirmed
by the similar construction put upon the Charters of the Supreme
Court at Calcutta, as appears from a note upon the Statute 21
Geo. 3rd, c. 70, s. 17, in *Smoult and Ryan's* valuable collection of

the *Rules and Orders* of that Court, lately published with the sanction of the learned Chief Justice, Sir E. Ryan, [vol. I., p. 66]. The Judges of that Court, it seems, have considered this Statute in which the words, "Inhabitants of the City of Calcutta," are, for the first time mentioned, not as giving the Court, for the *first* time jurisdiction over the inhabitants of Calcutta but as merely a declaratory Act, which neither extended nor narrowed the jurisdiction before enjoyed, but corrected an erroneous construction which had been put on the previous Acts of Parliament. And in support of this, positive reference is accordingly made in the note in question to the terms of the previous Charters and the same conclusion drawn as that by Sir A. Anstruther, viz., that the present jurisdiction is co-extensive with that of the Mayor's Court, and includes [independently of the Statute 21 Geo. 3rd] all persons being inhabitants whether at the time the cause of action accrued, or at the time of action brought. And this is the more material to the present purpose, because the words of the present Charter of the Calcutta Court, in the corresponding clause, much more nearly resemble those of our own than the words in the Bombay Charter.

On the whole, then, considering the ambiguity of the terms of our Charter on the point in question, and the want of any good reason, so far as I can discover, for supposing that the jurisdiction of Her Majesty's Court here was intended to be less extensive in its general nature than that of Her Majesty's Courts at the Presidencies, I am bound, in the absence of preceding Charters which might solve the difficulty, to resort to the next best mode of ascertaining the meaning and intent of the framers, viz., the terms used in the corresponding clauses of the Charters of those Courts, and the construction put upon them by the learned Judges presiding therein. What these are I have shewn; and the authorities referred to, in my opinion decisively establish the point, and this Court cannot refuse to entertain the present suit, the defendant being a resident in the Settlement at the time of action brought; notwithstanding the fact that the cause of action arose out of the jurisdiction. The plea to the jurisdiction is therefore overruled, and the defendant is ordered to file his answer within the usual time; the complainant's Agent undertaking to appear and answer any cross-bill which may be filed against him. Costs to abide the event of the suit.

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Mats nailed to the floor, oil-cloth nailed to a stair-case, and punkahs fixed to and depending from the ceiling by ropes and screws, are, both by law, and the custom in Penang, [a] fixtures.

Where the plaintiff had purchased a house with its appurtenances, of the defendant's principal, paid his purchase money and received his conveyance, and the defendant thereafter removed the aforesaid articles from the house, which were attached thereto in the manner stated,

Held, that the articles—in the absence of an agreement to the contrary—passed,

[a] The custom in Penang, it is believed, has since materially changed.—J.W.N.K.

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NORRIS, R. as fixtures, with the house, under the conveyance, to the plaintiff, and the defendant
1842. was liable in trover for their conversion.

BROWN AND The Statute of Enrolment, [27 Henry VIII., c. 16] does not extend to this
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Trover for mats, oil-cloth, and punkahs. *Plea*, the general issue.

The facts were as follows, and arose in connection with the sale of *Sans Souci* house and grounds, which belonged to a Mrs. Durand, to the plaintiffs. A Mr. Stuart had acted as the agent for Mrs. Durand, and the correspondence between him and the plaintiffs, are set out. On the 19th January, 1842, Mr. Stuart wrote to Mr. F. S. Brown, one of the plaintiffs, offering the house for sale. On the 20th, Mr. Brown in reply wrote that he was willing to purchase *Sans Souci* for 3,500 dollars,—“the payment” to be by two equal instalments, the first in six and the other “in twelve months—that two promissory notes running at interest “at 7 per cent. per annum for the respective instalments should “be given on the day that a bill of sale and possession of “the property were delivered to the purchaser.” On the 21st, Mr. Stuart in a note accepted on the part of Mrs. Durand, Mr. Brown’s offer according to the terms of his note, adding—“she “will execute the bill of sale on Monday” [the 24th,] “and “hopes that you will allow us nine or ten days from that date to “give us time to embark and get rid of our traps.” On the 24th, Mr. Brown wrote to Mr. Stuart, that he would receive the bill of sale and grant the notes that day, and would be happy “to “allow Mrs. Durand and Mr. Stuart’s family to remain in occupation of the house for the ten days they required it.” It was not until the 26th that the deed of bargain and sale, which had been signed and sealed on the 25th, was delivered to the plaintiffs. On the same day, [the 26th] they sent to Mr. Stuart the two promissory notes. After receiving them, Mr. Stuart wrote that “the transaction was all right in terms of Mr. Brown’s note.” This note of Mr. Stuart contained another paragraph which was as follows :—

“There are several things in the house belonging to her [Mrs. Durand], which it will be for the interest of both parties perhaps that you should take. When would you like to look at them, &c. Mrs. Durand bought the things alluded to, or the “great part of them rather, from Sir B. Malkin.” A sale of Mr. Stuart’s effects was advertised to take place at the house on the 3rd of February, and Mr. Stuart left the Island. On the 31st of January, the defendant [Herriot] wrote to the first plaintiff. “If you wish to see the fixtures in the house at *Sans Souci*, I shall “be most happy to shew them to you, and should like in that case “that you would appoint sometime either to-day or to-morrow for “that purpose, as in the event of your not taking them, I might “have time to remove them from the house before the sale of Mr. Stuart’s effects takes place” The first plaintiff in reply wrote that “he would look at the things Stuart was talking about, &c.” “I do not understand what you mean by fixtures—of course, these

"always go with a house." The plaintiffs went to the house, but refused to purchase the *fixtures*, which are the subject of this action on the ground that they were their own property. On the 1st February, the defendant wrote that he was quite satisfied that the furniture, mats, &c., were the property of Mrs. Durand, and that, if plaintiffs would not buy them he would remove them. Plaintiffs replied that, if the defendant removed any fixtures [and such they considered the mats that were nailed down, staircase oil-cloth, and punkahs], he would do so at his risk and responsibility as those belonged to them. They, however, repeated the offer which they had previously made to submit the difference to arbitration. This offer, the defendant rejected as he considered he was not authorised to accept it. The period of ten days that had been allowed to Mr. Stuart for the purpose of disposing of his furniture expired on the 3rd February. The auction was not concluded, however, until the 4th. On the morning of the 5th, the defendant detached from the house, and removed the articles with the conversion of which he was now charged. The registered conveyance and the correspondence were put in and admitted, and witnesses were called to prove the conversion and the damage thereby sustained, and also the custom of Penang with respect to fixtures. It appeared from the evidence that it was usual for the builders of houses to complete them by fixing punkahs and mats—that these always passed on any transfer of a house without being specially mentioned in the agreement of sale,—and that when they were to be reserved there was always a stipulation to that effect. The defendant remained a day and night in the house, after removing the articles.

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J. R. Logan, for plaintiffs. The circumstances of the case appear so clearly upon the face of the letters, that the questions to be decided are chiefly legal ones. Were the articles mentioned in the petition fixtures, and did they pass with the conveyance of the house? As to the first point, it might be sufficient to say that the defendant in his own letters has uniformly designated the articles as fixtures. But fortunately the law is so clear that we do not require to take advantage of such admission. Whatever uncertainty may attach to the law of fixtures in those numerous cases in which the conflicting interests of landlords and tenants require the decision of the Courts, questions as between sellers and purchasers admit of more easy determination. The broad distinctions which at one period embraced the whole law of fixtures have long diverged into numerous intricate and uncertain doctrines which have been conceded to the varying and accumulating claims of commerce. But none of the reasons which have lead the Courts to break through the rigid rules of feudal times to adapt the law better to the exigencies of trade, operate in favour of mere sellers. They are to be considered as standing in the place of Executors, and the rules which regulate the rights of heirs and executors retain their original simplicity and force. "The general rule relating to the right to fixtures, is that between the heir and executor; and, as between them, the second class of articles

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“ [fixtures commonly so called, but removeable as between landlord and tenant] would belong to the heir; all the other cases as to landlords and tenants, and execution creditors, are mere exceptions in favour of trade” per *Bayley J.* in *Colegrave v. Dias Santos* [2 B. and C. 77]; Lord Mansfield says, “all the old cases lean in favour of the heir, and the relaxations have only been in cases between landlord and tenant, and between tenant for life and the remainder man.” In the celebrated case of *Elwes v. Maw*, [3 East 38,] Lord Ellenborough said, that “as between heir and executor, the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto.”

There are two modes of converting articles, moveable in themselves into immoveables, which must be attended to in this case. Things may become heritable by accession, by being affixed to the freehold by means of nails, screws and the like, or by being built or let into it. In this manner the mats and oil-cloth claimed by the plaintiffs were attached to the house, and it will probably be considered that the punkahs, which were suspended by hooks let into the ceiling, were also heritable by accession. But, even, things which may be dissevered from the realty without injury to it may become heritable by destination. Whenever it can be demonstrated or inferred that it was the intention of the owner that the articles should be permanently annexed to the freehold they are irremovable by the executor.

The intention of the parties prescribe the rule which must guide the decision of this case, and the intention must be held to have been conformable to custom, until it is shewn that a different intention was in contemplation of both parties at the time of the sale. Had the property come to the seller by inheritance, and the sale been negotiated in the same manner, the law would have construed her intention to be, that whatever she had acquired as heir, should pass to the purchaser. Punkahs are attached to a house when it is built, in the same manner as a door. And the intention of the builder is the same in both cases, viz., that they shall remain permanently affixed to the house. Household furniture is in general the property of the tenant and removable by him at the end of his term, but who ever heard of a man carrying his punkahs as he carries his chairs and tables from house to house? When a house is erected in Penang, punkahs and mats are placed in it for the benefit of the inheritance.

The case already cited of *Colegrave v. Dias Santos* approximates so closely to the present, and the opinions of the Judges are so applicable, that they may be referred to more particularly. In that case the defendant had purchased at auction and taken possession of a house which belonged to the plaintiff. No reservation has been made of fixtures. Afterwards the plaintiff demanded as fixtures the articles named in the declaration—some of these being fixtures, and others were mere chattels, and on the defendant refusing to deliver them, brought his action in trover. Abbot C. J. said, “The usual course is to say that the

fixtures shall be taken at an appraisalment, or at a valuation to be made in some appointed mode; but here nothing at all was said respecting them. After the auction a conveyance was executed, the purchase money paid, and the defendant put into possession, all the articles which form the subject of the present action being still left in the house. The rule of law is most strict between the heir and executor. According to that rule, the articles in the two first classes mentioned by the plaintiff's counsel [articles clearly fixed to the freehold, and fixtures commonly so called but removable as between landlord and tenant] would be considered as parcel of the freehold. If they are so, why should they not pass by a conveyance of the freehold, when there is nothing to indicate a contrary intention? *Bayley J.* If we were obliged to support the verdict which has been found for the plaintiff, we should be obliged to do great injustice. It is assumed that the fixtures were not intended to pass by the conveyance of the house. But there is nothing to prove that; and on the contrary, I think that as nothing was said about them at the time of the sale, the plaintiff has no right to make this claim. In the case of an heir selling a house which descends to him, in the absence of any express stipulation, he would be taken to sell it as it came to him, and the fixtures would pass. If the plaintiff may now insist upon payment for these fixtures, he might also after the sale of the house have refused to sell the fixtures, and might have done great injury to the house by taking them away, [what has actually occurred in this case]. He should have insisted upon his right before the conveyance was executed. *Best J.* Where a stipulation is made that fixtures are to be taken at a valuation, that shews that they are not otherwise to pass. So of timber if there be a provision that it shall be valued: if there be not, the wood passes with the land, and the fixtures with the house. In the absence of authorities, I should hold, that everything which forms part of a house passes by a sale and conveyance of the house itself. If it descends, fixtures pass, so also if it be devised; why then should they not in case of a purchase?" But even if it could at all be made out that the articles which are the subject of this action remained the property of the seller of the house, it would have been incumbent on her to remove them before the completion of the sale. In the same case, Lord Tenterden cites the opinion of Gibbs C. J. who in *Lee v. Risdon* [7 Taunt. 188] says, speaking of the power which tenants have to remove fixtures, "unless the lessee uses during his term his continuing privilege to sever them, he cannot afterwards do it." It is true that Mrs. Durand remained in the house after the conveyance was executed, but by permission of the new owner, and for a special purpose. She left the Island and could delegate no authority to an agent beyond that of superintending the sale and removal of the chattels. Whatever authority the defendant may be able to shew he received from the seller expired on the 3rd of February, and his entrance into the house after that day could only be under a fresh authority from the plaintiffs, and for purposes which depended wholly upon their will. The correspondence shews

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that they expressly prohibited the removal of the fixtures and therefore, in whomsoever the right to them rested, their severance and asportation by the defendant were violent and illegal proceedings.

Carnegy, for the defendant contended, that the case cited for the plaintiffs, *Colegrave v. Dias Santos*, did not here apply, as not only the house and property in that case were conveyed to the purchaser, but also possession was given to him, with all the articles sought to be recovered *still remaining in the house*. That in the present case, the facts were the very reverse, inasmuch as the articles sought to be recovered by them were removed before possession given over, and also that defendant continued in occupation of the house with the plaintiff's knowledge for several days after removal of the articles in dispute. He contested the principle sought to be established by the plaintiffs in the case cited, upon the dictum of Best, J.; and maintained that the principle of the case decided by the Judges, who presided at the trial, was to the effect that a conveyance and possession were two different things; that the former did not imply the latter, and referred to *Lyde v. Russell* [1 B. and C. 394]; that this case should not be decided as between heir and executor, but on the rule as between landlord and tenant, or as between vendor and purchaser, 2 Powell, p. 1041a; that the articles now sought to be recovered back by the plaintiffs having been taken away previous to possession being given of the house, the plaintiffs were entitled only to the four walls, and also there being in the Conveyance neither consideration nor valuation put upon the mats, punkahs and oil-cloth, they therefore did not pass. He therefore submitted that mats, punkahs and oil-cloths, even admitting them to be fixtures, were legally removable by the vendor previous to possession of the house being given over to the purchaser, and in absence of all valuation and consideration being set upon them. As to what were and were not fixtures, he referred to numerous cases cited in 2 Powell, 1041 note.

Logan in reply, maintained, that in Penang, livery of seisin was not necessary to complete a transfer, but that possession passed to the purchaser upon the execution of the deed of bargain and sale, and that the Statute of Enrolment [27 Hen. VIII., c. 16] was not in force here. Mr. Stuart's letter showed that in the contemplation of the seller, possession did so pass on the 26th January. The seller inhabited the house from that date, not by virtue of a condition in the agreement that possession should not be delivered to the plaintiffs until the expiry of a certain term, but by the sufferance of the plaintiffs. The defendant had contended that without actual possession this action could not lie, but to maintain trover the right, not the fact of possession was essential, and this right was vested in the plaintiffs from the day upon which the deed of sale was executed: he had likewise contended that the rule as between landlord and tenant applied in this case; but to bring it in, it was necessary to have shewn that the articles had been made fixtures subsequently to the execution of the deed of sale, as then for the same time,

did the relation of landlord and tenant arise—that it was said, that even fixtures must be specified in the deed of transfer, and that as the articles which formed the subject of this action were not mentioned in the deed of sale, they were not intended to be nor were conveyed, according to Lord Tenterden and the other Judges who decided the case of *Colegrave v. Dias Santos*. The custom of England was against the defendant. The custom of this place had been proved to be similar, and the law, therefore as laid down in that case was strictly applicable here.

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April 12. *Norris, R.*—This is an action of trover to recover three mats, three punkahs and a stair-case oil-cloth, originally fixtures, as the plaintiffs contend, in *Sans Souci* house, and purchased by them with the house from Mrs. Durand, through her agent, Mr. George Stuart, but which the defendant, acting professedly on behalf of Mr. Stuart and Mrs. Durand, who both left the Island shortly after the sale of the house,—has removed, and refuses to replace. The purchase of the house by the plaintiffs, and the removal of the articles in question from the house by persons acting under the directions of the defendant, and his refusal hitherto to restore them were clearly proved. The grounds of defence were principally these: firstly, that the articles were *not* fixtures, in the proper sense of the term; secondly, that, if they could be so considered they were, nevertheless, of right *removeable* by the vendor under the terms of the agreement; and, thirdly, that at all events, the plaintiffs had never obtained possession of the articles and were, therefore, not in a legal position to recover damages in this form of action. To begin with the last objection, it is clear that actual corporal possession is not always necessary to the maintenance of an action of trover. An Executor for instance, may have trover for the goods of his testator before actual possession; for the law gives him a property in the goods which constructively draws to it the possession. A vendee also, when the contract was for ready money, may, after tendering the money, maintain trover against the vendor, on his refusal to accept it and deliver the goods; and the same where the vendees were to have immediate possession on giving security for payment at a future day, as in the present case,—that is, if the articles in question were included in the contract; the next point for examination and decision. But it was further argued in support of the first objection, that, whatever may be the law as to chattels, livery of seisin is necessary to a complete transfer of possession in the case of freehold property and whatever pertains to it, as fixtures necessarily must. This, however, is a mistake. Under the ancient mode of transfer by *deed of feoffment*, it is true, livery of seisin was necessary, but not so under the modern form of conveyance by *bargain and sale*; the purchaser being, in contemplation of law since the Statute of Uses, seised from the date of the Bill of Sale, to which all needful publicity [the great object of livery of seisin] is now given by Registration under the late Act; for the Statute of Enrolments [27 Hen. VIII., c. 16] does not, as observed by Mr. Logan, extend to this

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country. It was, in the second place, contended that the articles in question, whether fixtures or not, did not pass by the sale, but were of right removeable by the vendor under the terms of the agreement. What these terms were, appears in the correspondence between the parties and the Bill of Sale, from which it is clear that on the 21st January last, the plaintiffs had offered to buy and Mr. Stuart on behalf of Mrs. Durand agreed to sell, and that on the 26th the latter had actually sold, and the former actually bought and paid for by bills, as agreed, "the dwelling house and "ground of *Sans Souci*, with the out-houses and other buildings "and erections and other the appurtenances thereunto belonging;" terms sufficiently comprehensive to include all *fixtures*, properly so called, which were not actually removed or agreed to be removed before the completion of the contract by the execution of the bill of sale. That the articles in question were not actually removed until after the 30th January, that is at least four days after the plaintiffs had obtained legal seisin of all that passed by the bill of sale, is clear from the evidence of the carpenter Appoo; and I cannot discover either in the bill of sale, or in the preliminary correspondence any *proviso* or *stipulation* to justify such subsequent removal. In his note of the 21st January, it is true Mr. Stuart requests permission to remain in the house for nine or ten days after the execution of the bill of sale to give himself, Mrs. Stuart and Mrs. Durand "time to "embark and get rid of their traps;" and in his subsequent note of the 26th he says, "there are several *things* in the house "belonging to Mrs. Durand, which it might perhaps be for the "interest of both parties that you should take." Now although Mr. Stuart might possibly have intended these indefinite terms "traps" and "things" to include the articles in dispute, few men probably would have understood them in any other sense than did the plaintiffs, viz., as referring to chairs, tables, and other loose furniture as distinguished from the *fixtures*: a distinction actually made by the defendant himself in his subsequent letters. Certainly in the absence of any sufficient evidence to the contrary, I can ascribe no other meaning to terms so loose than what I believe to be the ordinary one, viz., *Chattels* in the common acceptation of the word—things *unattached* in any way to the freehold. The mats, punkahs, and oil-cloth which form the subject of the present action having then, as was proved, been originally *attached* by nails and screws to the freehold, and left so attached at and after the execution of the bill of sale, and no condition or reservation upon the subject appearing in the bill of sale or previous agreement, the case of *Colegrave v. Dias Santos*, which has been cited for the plaintiffs, would seem to be decisive in their favor, unless as contended for the defendant in the third and last place, these articles do not properly come within the legal definition of *fixtures*. To this objection a sufficient answer might, as observed by the plaintiff's agent, be found in the defendant's own admission to the contrary. But for the prevention of similar disputes in future, it may be desirable to state what I consider to be the law upon the subject, "*Fixtures*."

as Chitty observes, "is a term generally denoting the very reverse of the name," for in its ordinary acceptation it signifies "such things of a personal nature as have been annexed to the realty, and may be afterwards severed or removed by the party who united them, against the will of the owner of the freehold;" that is, provided the severance be effected during the *tenancy* of such party. The precise mode of annexation appears [according to the same writer, referring to Messrs. Amos and Ferard's excellent Treatise on the subject] to be immaterial, provided the article be "*fixed* in or to the ground or to some substance previously rendered a portion of the freehold." Now certainly this definition cannot but be held to embrace articles so circumstanced as those in dispute—mats, *nailed* to the floors—an oil-cloth *nailed* to the stair-case,—and punkahs *fixed* to and depending from the ceiling by ropes and screws. At least the definition seems to me quite as applicable in these cases, as in those of hangings, tapestry, bells, lamps, beds fastened to ceilings, wainscot fixed by screws, and furniture put up as fixtures; all of which have in England, been held to come within the legal description of fixtures removeable by the tenant during his tenancy, but passing to the landlord if not so removed, and consequently [according to the case cited] to a purchaser in the absence of any agreement to the contrary. Besides it must not be forgotten that in very many of the numerous cases upon the subject, the decision of the Courts have been greatly influenced by the particular circumstances of the case; and amongst these must reasonably be included the *prevailing local custom* in similar cases. Now the evidence of Mr. George Scott, and Mr. Anthony McIntyre, both long residents and the latter the most experienced auctioneer in the place, seems decisively to establish the fact that on sale of houses in Penang, punkahs, oil cloths and Bengal mats fixed like those in question are generally understood to pass with the house, unless, [of which he could not remember an instance,] there should be a special agreement to the contrary.

The plaintiffs are therefore entitled to judgment with damages, which, on a fair calculation, without needlessly recapitulating the details in evidence on the subject, I estimate at 100 dollars; and I think also that under all the circumstances, the plaintiffs who manifested a conciliatory spirit throughout, are entitled to their full costs.

Judgment accordingly.

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In rating Estates and Plantations in this Colony, for purposes of assessment, the terms "annual rent" and "annual value" in Acts 12 of 1839, and 12 of 1840, are synonymous terms, and the assessment can only be calculated on the annual *net* return of the property [a]

Principles of rating property for purposes of assessment discussed.

The Collector had assessed a spice plantation of the appellant

[a] These Acts have been repealed,—and assessment is now governed by Act 25 of 1856, as amended by Ord. 3 of 1879,—"*annual value*" being defined as *gross annual* rent. *See also 3746*

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upon the value of its gross annual produce. Appellant had objected to the demand upon the ground that under the Indian Act No. 12 of 1840, his land could only be rated upon its net proceeds. The appeal against the levy was made for the purpose of having the correct principle of valuation ascertained by judicial decision.

The Assessor appeared in person.

J. R. Logan for the Appellant. The object of the Assessment Acts is to raise a certain sum annually to be applied to the different purposes specified in sec. 13 of the Indian Act No. 12 of 1839. After the various fixed taxes on horses, carriages, &c., and the percentage upon the rents of houses are levied, there will remain a balance to be made up from the taxes on lands. These vary so much in value that it is not possible to impose a fixed sum on each estate, and some mode of apportioning the total amount required amongst the different properties in the Settlement must be resorted to. It is natural to suppose that Government out of the several modes that may exist of effecting this object, would select that which most equally and fairly distributes the whole tax amongst the land holders. There can be but one perfectly equitable principle of apportioning the tax, and that is by a percentage upon the actual revenue yielded by each estate to its owner, which is its real value. That this is the principle of the Land Assessment Act is sufficiently plain. By sec. 1 of the Indian Act No. 12 of 1840, it is enacted that from the 1st day of January, 1841, an assessment shall be levied on all lands not covered with houses or buildings within the limits of George Town, Singapore and Malacca, according to the real annual value thereof at a rate not exceeding ten per cent. of such annual values; and by sec. 2, which regulates the assessment of Mr. Scott's plantation it is provided that from the day aforesaid an assessment shall be levied on all property of the nature described in the foregoing section, but which shall be situated beyond the limits of the aforesaid towns at a rate not exceeding 5 per cent. on the *annual rent or value thereof*. Annual rent and annual value are here used as synonymous terms and it is difficult to conceive upon what foundation any doubt can be raised that the rent of lands had been chosen by the Indian Legislature as the only measure by which the levy of the tax can be equalized. It will not surely be asserted that the assessor may, at his discretion, adopt either of two very different modes of rating. As to the meaning of the word "*rent*" there can be no difference of opinion. It cannot possibly be taken to mean "*gross produce*." This expression no where occurs in the Act, and, since the Assessor must have fancied that he had found its equivalent somewhere within the small compass of the 2nd section, I can only conclude that he has affixed the same meaning to the term "*annual value*." As a general fact it may be stated that the rent of land is about one-fifth of its gross produce. If the assessor's reading is the true one, the legislature has left it entirely to his discretion to levy on either of two descriptions of property which differ in value in the proportion of 5 to 1. This interpretation amounts to the assertion of an arbitrary right to

make one estate pay five times the assessment which is levied from another estate of equal value. If, however, it be said that the assessor must choose one or other of the two modes of rating for general application, he will doubtless be guided in his choice by principles of reason and equity, and it will not be difficult to shew that these are altogether in favour of an assessment upon rent. But though this will appear sufficiently obvious from what will shortly be stated, I do not chose to adopt a line of argument which would proceed upon the admission of a reading of the Act which I cannot for a moment view as correct. Annual rent and annual value have, I maintain, been used by the framers of the act as synonymous. The annual value of an estate within the meaning of the Act is its real annual value to its owner, and not any arbitrary value which may be obtained by coining an imaginary revenue out of produce which the estate has never yielded, or which has been swallowed up in the wages of labour, in the price of materials used, and in the agricultural profit on the outlay of the cultivator: If the plain language of the Act is insufficient to mark the intentions of Government a very slight practical knowledge of agriculture, or of the simplest principles of political economy, should suffice to preserve the Officers of assessment from giving a direction to the provisions of the Act as much against reason, as it is inconsistent with justice. They have no difficulty in seeing that the real annual value of a house or shop is the rent or revenue which it yields to its owner. But they cannot apply the same definition to the real annual value of land. Because the case becomes a little more complicated—because the land does not spontaneously yield a certain number of current coin of the realm, but its annual value is the result of a process which must be annually repeated, involving various operations, but which may all be expressed and measured in money expended, the assessment officer unwilling to take the trouble of estimating the proportion in which other things than the land itself have contributed to the return, seizes upon the gross produce, carries off his 25th part, and leaves the owner of the land, the labourers, and the tenant who applies his skill, and risks his capital in the cultivation, to make a division of the remainder amongst themselves. There is this difference between a house and a piece of ground that in the first case the purchase money having been paid, the owner has nothing to do, but secure a tenant and draw his rent, but in the latter case the purchase money has been paid, and the land yields no revenue. An agriculturist must be procured—labour must be applied—capital must be risked—before the land yields its return. But, it is only the ground which belongs to the landholder, and he is only entitled to so much of the return as can fairly be put down to the credit of the soil. To ascertain this, there must be put on one side so much as is due to the labourers—to the seed and materials furnished by the cultivator—to his skill and superintendence—there must be deducted too a premium for the risk to which he has exposed the capital which he has employed. When all this has been done, the balance will shew what is due to the land itself, what has been the

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real value of the land to its owner during the year measured in produce, and that converted into money is the *real annual value of the land within the meaning of the Assessment Act*. To levy a tax upon anything more than this is not to tax the land, but to tax the skill, superintendence and capital of the agriculturist, and the wages of labour—sources of revenue never contemplated by the Act. It was said by Burke that “nothing is such an enemy to accuracy of judgment as a coarse discrimination; a want of such classification and distribution as the subject admits of.” The analysis of that compound result, the gross value of the produce of land, is not so difficult that the Assessor should refuse to undertake it. Every particular item of expenditure in agricultural employments is for the direct purpose of contributing to re-produce or re-place itself with an increase. Every such item therefore is, strictly speaking, a pre-investment of an equivalent portion of the produce, and must be withdrawn from the produce before the value of land for the year can be ascertained. Agriculture is an artificial and not a natural process. The land with all its natural powers and capacities of production derive from the inherent virtue of the soil, and those great fertilizing provisions of providence without which the mere earth, whatever its composition, would remain barren, does not, economically speaking, possess value in itself. It is the fruit of the vegetation which the efforts of man, aiding the powers of nature, cause to be produced upon it that develops its value. But the various instruments whose combined powers effect this process must be allowed to be each so far of a separate value in themselves, as they have operated in the production of the commodities which the harvest has given for distribution. The strength of the soil and the elements which have fertilized it have indeed been indispensable powers. But no less indispensable in the condition of a farm or plantation is the power of the horse, the ox or the buffalo, the manual strength and the mental faculties which enable the labourer to guide this inferior power, or to substitute his own sole industry, or which have been exerted in constructing the various implements without which the strength of the horse, or the industry of the labourer were equally unavailing. Not less indispensable is the skill of the farmer or agriculturist applying the results of experience, and perhaps of science, to increase to the utmost the productive powers of the soil, and to conform his mode of plantation to the laws of nature, and at the same time exercising incessant activity in superintending and directing the application of that labour without which all his skill were in vain. And lastly, as neither the farmer nor his labourers can postpone their demand for those necessities and comforts of life for the acquisition of which they give their skill and labour, as the cattle dealer, the carpenter, and other artizans whose labour may have been called in, cannot subsist upon the prospect of the harvest, capital must be advanced; and as the re-payment of that capital is dependant on the numerous risks to which agriculture is subject, the party advancing it, whether he be the farmer himself or

another, will not be satisfied with the usual price for the use of his money, but will claim a heavy premium, over and above. The value of all these several powers, [which, in the gross, may be correctly measured by the eventual claim of the capitalist] equally with the value of the land, must be drawn from the gross produce of their application. There is this great distinction, however, between the value of the land and the value of the former powers, that it is merely the balance remaining after the former have been satisfied out of the produce; and although those also are subject to variations in their respective values, the latter must be subject to the greatest fluctuation. In fact the real rent, as it has been explained in contradistinction to the reserved rent must receive the whole benefit of good seasons causing extraordinary productiveness, and bear the whole decrease arising from seasons of scarcity before any of it can fall upon the cultivator. Augmented fertility, produced artificially, ought of course to go to the cultivator, whose skill or outlay has caused it. I have entered thus fully into the subject of rent, because, I shall shew that it affords the only just criterion for assessing lands, and it was necessary to dwell upon the various elements which must always enter into the consideration of the subject, as their different relative proportions in different descriptions of cultivation, is the very reason, why rent enjoys this pre-eminence as a rule for equalising assessment.

I have alluded generally to the assessment upon the rent of houses to shew that annual value as used by the framers of the Act is the income derived from his estate by the owner. It has been attempted to carry the analogy between lands and houses a great deal further. It has been said that because assessment is levied on the whole annual return of a house or other building it must therefore be levied upon the gross produce of land. This at first sight might seem plausible enough to those who are unacquainted with the subject. To shew the fallacy of this very rapid and simple ratiocination we need only point out the non-existence of one fact which it assumes. If the argument be not a mere equivocate the same signification is attached to the term gross produce whether it be used with reference to houses and buildings or to lands. I have maintained that the value, revenue or any gross proceeds of both descriptions of property *to the owner* is the meaning of the term used in the Act. This reasoning on the contrary, unless it is quite equivocal, assumes that the gross proceeds of both descriptions of property which in the first instance come to the hand of the *tenant* is the meaning of the Act. We must put on one side dwelling houses which are not used for speculations or investment of capital by the tenant. Lands such as parks which are for ornament and pleasure and all others on which capital is not laid out for a profit may be put on the same side. On the other there are shops and other buildings not occupied as residences but which are used by the tenants merely for the purposes of trade, &c., and on this side also are farms and all lands used for the purposes of agriculture. To render the argument which I am opposing worth anything it must be true that

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assessment is levied on the gross proceeds of shops, *to the tenant*. But it has never been, nor was it ever held that it should be, so levied. If by the analogy between buildings, and lands so far as it goes, the meaning of the Act in reference to lands is to be determined, it must be argued that as buildings for habitation and ornament yield nothing to the tenant, and assessment is therefore levied on their mere annual value to the owner, and as in the case of buildings which are necessary and are used solely for speculations, the tenant is allowed to deduct from the gross proceeds of the speculation all the capital which he has invested, together with his profits and a remuneration for his own skill and trouble, and is made to pay assessment upon the share of such gross proceeds which goes to the landlord in the shape of rent and is the annual value of the building to him; so in the case of lands used merely for ornament and from which the tenant as he lays out no capital reaps no proceeds, the assessment must be levied on their annual value to the owner, and in the case of lands which are necessary, and are used, solely for the speculations of the agriculturist, he, the tenant, must be allowed to deduct from the gross proceeds, his outlay, his own wages, and his profit, and assessment must be levied on the balance that accrues to the landlord.

This may be otherwise illustrated. House building and cultivation are both speculations. In this respect the owner of the house and the cultivator of the ground occupy similar positions. Of two men who are possessed of the same capital one resolves to invest his money in house-building, the other in the cultivation of paddy. The cost of a house, let us say is \$2,000; the annual rent \$400. This is a return of 20 per cent. upon the capital invested. Take the parallel case of investment of an equal sum in the cultivation of paddy. The gross proceeds may be \$6,000 or 3 times the capital invested. From the speculator in houses an annual assessment is levied upon the fifth part of the capital which he has risked. From the speculator in paddy an annual assessment is levied upon three times the amount of his capital. The disproportion being as 15 : 1.

Perhaps in the present case and in similar cases, the assessor may seek to justify his proceedings by alleging that the owner of the ground cultivates it himself, and the whole produce belongs to him. This is true—but the whole produce does not go to him as owner of the soil. The real annual value of the *land* is the same as if it had been cultivated by a tenant, and there can be no good reason why the capital of a landholder any more than that of a farmer or of a person advancing to the farmer should be taxed when he chooses to employ it in agriculture. To tax his capital when he employs it in this way and leave it exempt when he lays it out at interest or embarks it in trade would certainly be an effective mode of discouraging agriculture.

To make the owner of land pay a tax upon what the land never yielded him,—for assessment though advanced by the tenant really falls upon the owner, and to add to the actual value of

land that which is the fruit of labour, skill and capital would be at once inequitable and unreasonable.

I now proceed to shew that to substitute the value of the gross produce of cultivated land for the real annual value of the land itself would not only be unreasonable in itself, but would wholly defeat the intention of Government to distribute the tax equally amongst the contributors. If all land was of the same quality and under the same kind of cultivation the gross produce might be taken as the criterion for apportioning the tax, because, it would on every estate bear the same proportion to the real annual value. But the differences of soil and of products are so great that the annual value of an orlong of ground is far from being uniform throughout the Settlement. An orlong of paddy land in some of the best tracts in Province Wellesley may yield twice or four times the quantity of grain that is produced on an orlong of some of the worst tracts, and yet the cost of cultivation is likely to be the same in both. If the gross produce be made the rule of assessment mark in what manner it will operate! The produce of an orlong of good land, we shall say is of the value of 24 Spanish Dollars, the produce of the inferior land of the value of 12 Spanish Dollars. The good land is assessed upon the assessor's principle at 96 pice; the poor land at 48 pice, or one-half. Now, what is the real value or revenue of the two pieces of ground? An equal quantity of the produce has in both cases been consumed by the labourers, whose work was as necessary to the production of the grain, as the powers of the soil. An equal quantity has in both cases gone to replace the seed, and to compensate other expenditure. In both cases about 8 dollars may be equivalent to the quantity of produce that has been, so to speak, necessarily expended in advance, in cultivation. When this is deducted, the supposititious proportion upon which the assessment has been levied is destroyed. It now appears that the actual return of the good land was \$16, and that of the poor land only \$4. By the present false principle of assessment, which altogether overlooks facts, it was made to appear that the proportion of the annual values of the good and poor lands was as two to one, whereas in reality, it is as four to one. The owner of the latter has derived from it exactly one-fourth of the revenue or return which the former has derived from his good land, and yet, he has been compelled to pay, not one-fourth of the assessment payable by the former, but *one-half*! But take another case, where the land is so barren that the entire produce only suffices to furnish food for the ryot and his family, who cultivate it. There is nothing to assess, and yet, if the principle of the assessor be correct, the ryot must starve four days out of the hundred to afford an assessment. But if the soil varies so much in fertility as to render the assessor's rule altogether unequal and unjust, the produce of the different plants cultivated, and the modes of cultivation, do not less affect the operation of the rule. This too may be reduced to the principle which I have already adverted to, *vis.*, that, whatever prevents the proportion between

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the outlay, &c., and the gross produce from remaining exactly the same on all lands however cultivated, must prevent the assessor's rule from operating fairly and equally. I have returns which shew the expenditure and the gross produce in different kinds of cultivation, but they are somewhat long, and instead of reading them, I shall refer to Major Low's work on the agriculture of the Settlement, which, although I may not admit the correctness of all his estimates, will serve to shew how greatly the proportion between the gross proceeds, and the outlay differs in the cultivation of the numerous products of the soil. I may give one or two instances. As a criterion for spice plantations which are fully matured and cultivated, and the limits of which are permanently fixed, Mr. Ibbetson's plantation at Ayer Etam may be taken. The annual expenses amount to \$3,500, and the value of the gross produce \$9,047. The expenses are more than a third of the return. But say that in nutmeg plantations, and the same proportion nearly will apply to cloves, the annual outlay is to the return as one to three. The annual expenditure in the cultivation of an orlong of full grown betelnut trees may be stated at \$17.50; the value of the gross produce at \$80, but say the proportion is as one to five. Major Low states, that the expense of cultivating an orlong of good paddy land in Province Wellesley to be \$4, the value of the gross produce \$24. The proportion here is one to six. But on poor lands, it may be as one to two upon an average. The expenditure incurred upon an orlong of full grown cocoanuts may be stated at \$6.50. The price of produce varies, but taking it at \$1.25 for 100 nuts, the value of the gross produce will be \$62½, the proportion here is one to ten nearly. It thus appears that in one description of cultivation the outlay may be only a tenth part of the gross produce; in another it may be one-sixth; in others it may be one-fifth or one-third and even much more; nay how often, from the risks to which all agricultural speculations are exposed, may it not greatly exceed it. A speculator may not so much as recover his outlay. He may lose one-half, and yet the remainder is to be taxed, as, if it were a real addition to his capital which his land had yielded him. Such are the consequences of losing sight of the very simple, and apparent fact that the gross produce of the plants grown upon a piece of ground is not the annual value of the ground itself, but is composed of several elements which must be separated to ascertain the true mode of assessment. Where land is let, the landlord and tenant effect this themselves, and the assessment is to be levied on the actual rent which the former annually receives. Where, however, there is a gross disproportion between the reserved, and what I have denominated the real rent, which will seldom happen, the assessor is not to be bound by the former. Where the landlord turns speculator himself, the Collector must make the separation, and as all Governments encourage agriculture, and it is of the highest consequence to this Settlement that capitalists should become cultivators, it is to be hoped that this duty will not only be discharged equitably, but that even a greater deduction will be

made than the portion of the produce which would have gone to the tenant had the land been let. The motives for this liberal mode of dealing with landholders who cultivate their own lands have been so well expressed by Dr. Adam Smith that I shall quote his words, especially as they seem, with some slight modifications, peculiarly applicable in the circumstances of this Settlement.

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"When the landlord chose to occupy himself a part of his own lands, the rent might be valued according to an equitable arbitration of the farmers and landlords of the neighbourhood, and a moderate abatement of the tax might be granted to him, in the same manner as in the Venetian territory; provided the rent of lands he occupied did not exceed a certain sum. It is of importance that the landlord should be encouraged to cultivate a part [here it may be safely said *the whole*] of his own land. His capital is generally greater than that of the tenant, and with less skill he can frequently raise a produce. The landlord can afford to try experiments, and is generally disposed to do so. His unsuccessful experiments occasion only a moderate [but in Penang frequently a heavy] loss to himself. His successful ones contribute to the improvement and better cultivation of the whole country" [3 Smith's "Wealth of Nations," 266.] "In the Venetian territory, when the proprietor cultivates his own lands, they are [for the purposes of taxation] valued according to an equitable estimation, and he is allowed a deduction of one-fifth of the tax so that for such lands he pays only 8 instead of 10 per cent. of the supposed rent" [*id.* 263].

With respect to plantations of spice trees, such as that from the assessment of which the present appeal has been made, it may seem difficult to make a perfectly equitable estimate. The principal kind of cultivation—that of rice—the staple article of food in eastern countries—should in some measure regulate the rent of all lands under whatever kind of cultivation. Rents in England average one-fifth of the gross produce. And, according to Major Low, "the average money rent here at present for all land is nearly the same." According to the same authority "the average rate of money rent for the best rice is 4 Spanish dollars an orlong or about one-sixth of the gross produce value." What deductions then are made from the gross produce of a rice field before we arrive at the real annual value or rent of the land? In the first place the whole actual cost of cultivating the plant from the seed to maturity, the price of the seed, the interest upon the price, and the wear and tear of cattle and implements. In the second place the ordinary profit on agriculture which in different kinds of cultivation should be proportioned to the risk. When we endeavour to apply the same mode of estimate to spice cultivation we are met on the threshold by a difficulty arising from the different nature of the plant. The rice is an annual and the whole cost of the plant is at once deducted from the produce of the first and only crop. The spice tree on the other hand requires years to reach maturity, and does not at once yield all its fruit on arriving at that stage. The cost of bringing the tree to maturity is so heavy, being not less than from 350 to 400 dollars per orlong, that the produce of the first bearing year would not nearly replace it. This difficulty may be got over, however, in several ways—by allowing the produce to remain untaxed till the whole expenditure has been replaced, by allowing interest year after year upon the original cost of bringing the plant to maturity, or by striking an average upon a long period of years including the unproductive ones. It will probably be answered that

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the principles by which Courts in England have regulated the apportionment of poor-rates are unfavourable to such allowance. Properly considered I do not think they are, and it would certainly be more fair if the allowance were made. The annual outlay of all kinds must of course be deducted. The greatest difficulty will be in fixing a just profit upon the stock invested. The profit in the case of spices and in some other kinds of cultivation such as coffee, and, in some localities, sugar, must be high because the risk is peculiarly great. It is well known that thousands of dollars have been expended in Penang in forming clove plantations which have died after yielding a single crop. The uncertainty in the price of spices adds a high degree of risk which entitles the cultivator to a proportionate premium. It may be said that the determination of all these matters will be attended with much trouble and some difficulty. This is very true, but the same trouble and difficulty have been encountered in every country in the world where a tax has been laid upon rent, and no amount of trouble can justify the adoption of an arbitrary, illegal and unequal rule of taxation. One thing is very clear, the task will never be accomplished by men who are not conversant with agriculture. Let a committee or jury of agriculturists and landholders be appointed by Government, embracing men interested in every description of cultivation, and no difficulty whatever will be experienced in fixing a fair rent for lands yielding every different production. When this is done, and a correct agricultural survey of the Settlement made, it will be easy to fix the percentage that must be levied on the gross rents of the Settlement to produce the requisite funds for the purposes of the Act. The amount levied, will be the same whatever mode of apportioning it be adopted, but I have shewn that there is only one equal and equitable criterion—*viz.*, the annual rent. To take the gross produce as the criterion seems as reasonable as if a fixed sum was to be levied upon every plant without making any distinction between a stalk of paddy, the produce of which is too insignificant in value to be expressed in money, and a nutmeg tree of which the produce may be worth many dollars annually.

All analogy,—the usage of the Settlement,—the system followed in India and Great Britain—attest that the rule for which I have contended is founded in reason, justice, and convenience. By sec. 2 of Regulation I. of 1827 of the code of Prince of Wales' Island, which provided the means of cleaning, watching, lighting, upholding and keeping in repair the streets of George Town, and the roads in the country, &c., it was provided that "an assessment shall be levied on all dwelling houses, shops and lands of every description beyond the limits of George Town, the annual rent or value of which shall be equal to or exceed twelve Spanish dollars to the extent of two and-a-half per cent. the said annual rent of such houses, shops, or lands, or yearly value, save and except such houses and lands as are hereafter declared "excepted." I hold receipts from the assessors for a series of years shewing that a deduction was made of from 25 to 50 per cent. from the proceeds of spice plantations to fix the annual rent for

assessment. By 33 Geo. III., c. 52, s. 158, which provides for cleaning and repairing the streets, &c., of Calcutta, Madras and Bombay, the Justices of the Peace are authorised "for the purposes of defraying the expenses thereof from time to time to make an *equal* assessment or assessments on the owners or occupiers of houses, buildings and ground in the said towns or factories respectively, according to the *true and real annual values* thereof, so that the whole of such assessment or assessments shall not exceed in any one year the proportion of one-twentieth of the *gross annual values thereof, &c.*" It appears that in Calcutta, this assessment is levied on the *annual rent*.

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When we refer to the Acts regulating the modes of assessing land for different purposes in every part of Great Britain, we find that in no one instance, with the exception of tythes for the support of the clergy, is the gross produce of the land taxed. By the 55 Geo. III., c. 51, which regulates the mode of assessing the land for country rates, these are to be collected rateably and equally according to a certain pound rate of the *full and fair annual value of the messuages, lands, &c.*, and rateable to the relief of the poor, &c., and certain provisions are made whereby the Justices may be enabled to ascertain the "*fair annual value* of all "property liable to be rated." In Great Britain, the land tax is levied on the rent.

By 12 Geo. II., c. 20, county rates are to be paid out of the poor-rates [s. 2], and in places where there is no poor-rates, they are to be levied in such manner as money for the relief of the poor is by law to be rated or levied [s. 3], and by 2 Geo. IV., c. 85, [s. 2] in such places the justices may appoint persons to tax and assess county rate upon all messuage, lands, tenements, and hereditaments "*in such and the same manner as the messuages, lands, tenements, and hereditaments, within any parishes or places where a rate is made for the relief of the poor.*" By 43 Eliz., c. 2, money is to be raised for the relief of the poor "*by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tythes impropriate, propriations of tythes, coal mines or saleable underwoods in the said parish.*" In the 4th vol. of Burn's Justice of Peace, by Chitty, pages 177 to 192, the principles of valuation for the assessment of poor-rates under this Act which have been laid down by the Court of Queen's Bench are very fully illustrated. Amongst the rules which are therein deduced from the decisions is this—"that although the *rent reserved* cannot be always relied on; yet *the annual sum at which the property would let for, is the fair criterion of its value.*" In *Rez v. Chaplin*, I. B. and Ad. 926 [4 Burn 188], Taunton, J. said, "*In ascertaining what a property is worth to let, the best criterion in general is what it actually does let for,*" and Patteson J. said, "*Where the land is not actually let, it becomes necessary to calculate what a tenant would pay for it where it is let. The actual rent is the criterion unless it can be clearly shewn that it is too small.*" In *Rez v. Hull Dock Co.*, 5 D. and R. 359; 3 B. and C. 516 [Burn's p. 185], Lord Chief Justice Abbot said—"the whole worth or value is made up of what is paid in rent and what in rates, and other

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"outgoings. Land intrinsically worth £40 can only pay a rent of £30, if it is to pay £10 per annum in other wages; and in estimating a rent to the landlord and tenant, look to the value of the thing on the one hand, and the outgoings on the other; and the outgoings must be deducted from the value before the rent can be fairly fixed."

[Logan also cited *Rex v. Tomlinson*, 4 Man. and R. 169, 9 B. and C. 163, *Rex v. The Trustees of the Duke of Bridgewater*, 4 M. and R. 143, 9 B. and C. 168, *Rex v. Joddrell*, 1 B. and Ad. 403, and *Rex v. Adams*, 1 N. and M. 162, 4 B. and Ad. 61].

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May 25. *Norris, R.* This is an appeal against an assessment made on the defendant's land under the Indian Legislative Act No. XII. of 1840, but as the defendant contends, not in accordance with the term and meaning of that Act; the assessment being calculated on the full value of the gross produce of the land for the year, a mode of calculation not warranted, it is contended, by the terms "annual rent or value," in the 2nd section of the Act, which regulates the assessment of "lands not covered with houses or buildings" and "situated beyond the limits of George Town," such as is the land in question.

The point has been argued by Mr. Logan with his usual clearness and ability, though perhaps at more length than was necessary, seeing that no Agent was retained to oppose him—that the appeal is amicable for the purpose of obtaining a judicial decision of which both parties are desirous,—and that the English cases collected in Burn's Justice, title "Poor-rate," and referred to by Mr. Logan, are quite decisive of the point in dispute. These authorities leave me little more than to repeat the principles therein laid down. The terms of the Act "annual rent," and "annual value," are obviously convertible. Where the land is *let*, the assessment must be levied on the actual "rent" reserved, if not too small; where it is *not let*, on the annual "value," or sum for which it *would let*, if the owner wished to let it. But, it is obvious, that no man in his senses would engage to pay a rent equivalent to the value of the gross produce, without any deduction for the expenses of cultivation. In the words of Mr. Justice Taunton in the case of *Rex v. Chaplin*, I. B. & Ad. 926, cited in Burn, "the profits of land are to be valued at what they *would let for communibus annis*, and it has, I believe, been held that no difference is to be made, because in one particular year there was a loss. In ascertaining what a property is worth to let, the best criterion in general is what it actually does let for." And Mr. Justice Patteson, in the same case, says, "Where the land is *not actually let*, it becomes necessary to calculate what a tenant *would pay it*. Where it is let, the *actual rent* is the criterion, unless it can be clearly shewn that it is too small; but that is not ascertained by enquiring whether the property was more or less beneficial in a particular year."

The assessment in this case therefore must be amended and levied in conformity with the rules above laid down. And having thus disposed of the immediate question, I wish to add a few words in justice to myself. Circumstanced as these Settlements are, there have been many occasions in which it seemed to me that I could not properly refuse to give an extra judicial opinion to those who thought it worth their while to ask for it [a]. But in so doing I never expected, as has happened on the present occasion, that such opinions would be openly quoted and acted upon as nearly tantamount, which of course they are not, to judicial decisions. This is not fair to any Judge whose opinions may thus be easily made to appear inconsistent, vacillating and worthless—not perhaps because they really are so, but because the question may have been indistinctly proposed or the answer wrongly interpreted. On the present occasion I may be allowed, as I have the opportunity, to say that the opinions I have given have not been inconsistent. If in reply to a question put to me in Court some months ago, I expressed an opinion that the assessment should be levied on the *net* produce of lands, I am not answerable for the erroneous conclusion which some appear thence to have drawn, that the assessment might then be evaded altogether by landholders making it appear that their net produce was from enormous deductions next to nothing. Nor again when, to a question “whether *“estates should be assessed on the same principle as houses which “pay on the gross proceeds or amount of rent,”* I shortly answered in the affirmative, do I hold myself responsible for the want of precision in the question, or the loose interpretation put upon the answer, and which appears to have led to the present appeal. On both occasions my opinion was substantially the same and consistent with that which I have now given. In future it will be my own fault if the consequences of similar mistakes are cast at my door. Not that I mean to complain of any intentional breach of faith, but of a want of due consideration in those who consult me.

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It is a sufficient reason for breaking off a promise of marriage—even after a large sum of money has, in accordance with Chinese custom, been spent in consequence of the engagement—that the plaintiff is inflicted with an infectious disease, even itch.

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June 21.

This was an action by the intended bridegroom, to recover \$1,000, for breach of promise of marriage and for money paid, laid out and expended at defendant's request. It appear that the defendant had promised the plaintiff to give her daughter to him in marriage, and a day was fixed for the marriage; that, in accordance with Chinese custom, the plaintiff had, in faith of the defendant's promise, gone through the usual formalities and ceremonies and had spent a large sum of money, but the defen-

[a] On this point, see *Edwards v. East India Co.*, 15th Dec., 1840, foot note [a] [end of Recorder's decision] Magistrates' Appeals, Vol. III. of these Reports—see also, regarding same matter, Preface, &c., time of Sir William Norris, R.

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dant on the eve of the marriage, broke her promise and refused to allow her daughter to marry the plaintiff. The defendant admitted the promise, the receipt of presents, &c., but pleaded that "long before the commencement of this suit, it was mutually agreed by and between the plaintiff and defendant that the said contemplated marriage should be, and the same was wholly rescinded and abandoned accordingly." From the medical testimony of Mr. Surgeon Smith it appeared the plaintiff was inflicted with an infectious disease, which he supposed to be itch.

J. R. Logan, for plaintiff.

C. Baumgarten, for defendant.

Norris, R., held, on the authority of Lord Mansfield quoted by Lord Kenyon in *Foulkes v. Sellway*, Esp. 236, that that was a sufficient reason for breaking off the engagement and gave judgment for the defendant.

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The mere fact that a judgment debtor, in order to defeat an expected execution, transfers his property to another creditor, with a view of preferring that other creditor to the execution creditor, does not render the transfer fraudulent and void under the Statute, 13 Eliz., c. 5.

June 23.

Notice of claim by a third party, to property seized, given to the execution creditor, is notice to the Sheriff; and notice to the Sheriff, thereof, is notice to the execution creditor.

Seizure and sale by the Sheriff is, but one act and one conversion, and where the execution creditor indemnifies the Sheriff; it is the joint act of both.

Semble.—It is not necessary to serve the Sheriff, who seizes the property of a third party as property of the judgment debtor, with notice of the claim of such third party, in order to render the seizure and sale thereunder, a conversion.

This was an action of trover, and the facts giving rise to it sufficiently appear in the judgment.

C. Baumgarten, for plaintiff.

J. R. Logan, for defendant.

Cur. Adv. Vult.

On this day judgment was delivered by

Norris, R. This is an action of trover against the Sheriff and an execution creditor of one Abdullah, and the subject in contest is the value of a barque called the *Mahomed Bux*, seized and sold by the first defendant in part satisfaction of the judgment obtained by the other, the said vessel having, as alleged by the plaintiff, been transferred to him by Abdullah for a *bona fide* consideration previous to the delivery of the writ of *Fi. Fa.* to the Sheriff. It is not denied and was indeed clearly proved, that the transfer and delivery of the vessel by Abdullah to the plaintiff took place before, though but a few hours before, the delivery of the writ, but it is contended that the transfer was void under the Statute 13 Eliz., c. 5, as having been made by Abdullah "with

"intent to *delay, hinder or defraud* his creditor," the second defendant, of his just debt. It appeared, in evidence, that in March last year, the plaintiff had sued Abdullah for the sum of Dollars 1,300 odd on an agreement, and in May following for Dollars 1,400 odd on a promissory note. To the first action Abdullah had pleaded the general issue with notice of set off to the extent of Dollars 1,700 odd, to the second action no plea had been put in; pending these two actions against Abdullah, a third was brought by the second defendant, Muhomed Meera Lebby, to which on the 14th June, Abdullah confessed judgment, but judgment was not given nor execution sued out until the 19th. The writ did not reach the Sheriff's hands till between two and three in the afternoon, whilst the vessel had been transferred and delivered to the plaintiff in the course of the morning. Now that the transfer was made *with intent to hinder or delay* Mahomed Meera Lebby from reaping the fruits of his judgment there can be no doubt; but it does not necessarily follow that the *transfer* was therefore *fraudulent*, see *Estwick v. Cailland*, 5 T. R. 420. Nor was the preference thus shewn to the plaintiff necessarily fraudulent within the meaning of the Statute; *Halberd v. Anderson*, 5 T. R. 235. But it is contended that the transfer was fraudulent as having been made without a *bond fide* consideration. The consideration appears to have been a *previous debt* against which the value of the ship, Dollars 800, [the sum for which she actually sold] was to be set off; and this the cases referred to by Mr. Baumgarten, show to be a good consideration. The real value of the ship, to be sure, was then only Dollars 400, as she had been previously mortgaged for so much—but to make up for this, Abdullah's brother, Abdulrahman, transferred land worth Dollars 400 in part liquidation of the same debt, so that the plaintiff obtained in the vessel and land value nearly to the full extent of his claim on Abdullah, which according to the evidence was about Dollars 900; and the amount for which the latter was sued in the two actions, reduced by the set off, appears to have been little more, *viz.*, about Dollars 1,000. It is asked whether this account of the matter, which is given by Haji Ahmed is *credible*—seeing that the two actions against Abdullah still remain on the file, and that he has no *release* to show? If the parties had been European Merchants—regular men of business,—this argument perhaps might have had considerable weight;—but we all know the loose and careless way in which the natives generally manage such transactions; and knowing this, I confess it does not surprise me that Abdullah should have considered himself perfectly safe without any formal release or withdrawal of the actions, and that the evidence of Mr. McIntyre, his own brother, and Haji Ahmed would conclusively show that all claims had been settled by the transfer of the ship and land, should Syed Abbas ever have the hardihood to assert the contrary. Haji Ahmed's evidence, it is true, is not quite consistent with that of Mr. McIntyre;—the former asserts that the nature of the considerations was explained to Mr. McIntyre in the first instance prior to his drafting the bill of sale; Mr. McIntyre says—"no—not until I had enquired

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"where is the money." I don't, however, consider this discrepancy of sufficient importance to throw entire discredit on Haji Ahmed's evidence,—it may easily have arisen from inadvertence or forgetfulness; and Mr. McIntyre himself says, that he had no reason to suspect that the whole transaction was not *bonâ fide*. But in opposition to Haji Ahmed's testimony is brought forward that of Che Lah, who certainly tells a very different story. If he is to be credited the amount of Abdullah's debt to Syed Abbas was only 400 or 500 instead of 900 dollars, and as *that* debt was fully secured by the transfer of the *land*, the transfer of the vessel also, it is argued was clearly superfluous and must therefore have been *colourable* and without any *bonâ fide* consideration. But the veracity of this account is rendered more than dubious by the chain of improbabilities connected with it. It is, in the first place highly improbable, scarcely credible, that Syed Abbas on the one hand should have had the audacity to demand and the address to obtain, or that Abdullah and his brother, on the other should have been simple enough to give valid securities [for, as against them they are unquestionably valid] to the extent of 800 dollars for a debt little more than half that amount. It seems absurd also and incredible that Syed Abbas should out of *mere joke*, [as according to Che Lah, he declared was the fact] have sued Abdullah for 2,700 dollars, when he admits that he could claim only 500. Again, if it be *true*, as Che Lah says, that he was on the most intimate and confidential terms both with Syed Abbas and Abdullah, it is little to his credit, to say the least, and necessarily leads one to suspect his testimony, that he should have been treacherous enough to reveal these confidential communications to Mahomed Meera Lebby. If on the other hand, this pretended intimacy be a fiction, falsehood necessarily impeaches the testimony altogether—strange, too, that so confidential an adviser who, if he is to be believed, had been entrusted with the entire management of the compromise should have been absent at the critical and important moment, when the transfer was formally made at Mr. McIntyre's. Certainly, it is very difficult to reconcile both accounts; and being thus in a manner driven to decide between the two witnesses, I have no hesitation in giving the preference to Haji Ahmed, as, in my judgment the more respectable witness, and as giving an account which appears more accordant with probabilities. Admitting the transfer, however, to have been *bonâ fide*, it was contended that the Sheriff had received no notice—though doubts were at the same time expressed whether notice was necessary. I also doubt whether notice was necessary. The transfer was openly and fairly made at a Public Notary's and the ship was delivered over in open day. The Sheriff, therefore, at his peril, seized it as still the property of Abdullah. But, in truth, notice was actually given,—notice to the *former* Sheriff, which was proved, was notice to Mahomed Meera Lebby the execution creditor, and notice to him was sufficient notice to the succeeding Sheriff; this is clear from the present Sheriff's refusal to act without an indemnity bond from Mahomed Meera Lebby. Lastly, it was objected that no evidence

had been given to prove a *joint* act of conversion by the defendants—that the seizure was one conversion—the sale another. This I cannot admit, even were it necessary to prove such unity of operation in an action for a tort. The *sale* was the only conversion and that was a joint act, the Sheriff selling and the other defendant, indemnifying him for so doing. The plaintiff is clearly entitled to judgment, and under all the circumstances, I think, with full costs. The damages I assess at dollars 1,000, *viz.*, \$800, the sum for which the ship sold, and \$200 for loss of freight, &c., from the time of seizure.

Judgment accordingly.

McINTYRE v. G. D. GALASTAUN.

A creditor who had claims in three several capacities against his debtor, received in all three capacities dividends from the Trustees of his debtor, under a composition deed. He signed the composition deed once, without shewing, on the deed, in what character he signed it. He subsequently denied he had signed the deed and received any dividend, except in his individual capacity, and threatened his debtor that unless some security was given for one of the two claims which he had in a representative character, he would take proceedings against him. He concealed from the debtor the fact that he had received dividends in such representative capacity, and when the debtor was induced to make a mortgage bond to secure the one representative claim, he falsely represented that he had paid the estate he represented, and required the bond to be made in his own name, which was done.

Held, the receipt of the dividends in the three capacities, and signing his name generally, was a sufficient assent by him to the composition deed, so as to make it binding on him.

Held also, that the mis-representation that he paid the estate he represented, the debtor's debt,—and the fraudulent concealment in not disclosing that he had already received, in such representative capacity, a dividend under the composition deed, were sufficient to render the mortgage bond, fraudulent and void, and the same was ordered to be given up to be cancelled, at the suit of the debtor, who subsequently came to learn of the fraud practised on him.

The facts and pleadings in this case are so fully set out in the judgment, that it is needless to state them here.

J. R. Logan, for plaintiff.

C. Baumgarten, for defendant.

Norris, R. The defendant in this suit has obtained judgment at law on a bond for dollars 5,500, and the object of the present bill of discovery is to have the bond set aside on the ground that it was obtained by fraudulent concealment and mis-representation, and that the defendant may be restrained by injunction of this Court from proceeding further on the judgment he has obtained or bringing any other action on the bond.

The bill states in substance that complainant was a merchant and auctioneer, and that having sustained heavy losses, and being in embarrassed circumstances, a meeting of his creditors was called in the month of May, 1832, at which the testator and most of the other creditors attended, when it was agreed that a deed of composition should be entered into and that complainant should assign over all his property to the testator, Mr. Geo. Scott and

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Mr. Philip de Murat, as trustees for the benefit of the creditors in general; that on a subsequent day in the same month, a deed of composition was accordingly drawn up and executed by the complainant, the said trustees and most of the creditors whereby among other things it was covenanted and agreed that the complainant should have "full and absolute liberty, license, and authority to follow and attend to any affairs, business matters and things whatsoever, without any arrest, attachment, execution, impediment or molestation whatsoever against his person or estate by the said parties, and that if any or either of them did or should arrest, attach or otherwise molest the person or effects of the complainant, then the debt and debts of or belonging to the person or persons so acting contrary to the said provision should be forfeited and void, and the grant and license thereby given should be and operate as an absolute and final release," &c.

The bill goes on to state that the complainant assigned over all his property accordingly, that it was sold and realised, and that a schedule was prepared and signed by the complainant shewing the amounts of the several debts due by him and the proportionate dividends; that among other debts mentioned in the schedule appeared one of 552 dollars due to the defendant's testator, another of 138 dollars due to Mrs. Carapiet, the mother-in-law of the said testator, and another of 2,715 dollars due to the said testator as Executor of Gregory Lucas deceased. That sometime in 1833, the said testator received the dividend on his own individual claim and signed the schedule accordingly; and that sometime in 1837, he received the dividends on the debt due to Mrs. Carapiet and to himself as executor of Lucas; that the schedule having at that time been missed the testator did not sign it for the two last mentioned dividends, but that he gave a special receipt for the latter particularly worded with reference to the composition deed; that the complainant was ignorant of the testator's having received these dividends until after the defendant had brought his suit at law on the bond now in question; that in March, 1838, the testator demanded from the complainant payment of his debt to him as executor of Lucas; that complainant reminded him of the deed of composition as exempting him from further liability whereupon the testator declared that he had only executed the deed with reference to his own individual claim and not as Executor of Lucas; that the complainant endeavoured to prevail on him not to sue, but that testator threatened immediate proceedings unless complainant would sign the mortgage bond in question; that the testator *concealed* from complainant the fact that he had already received the dividend as Executor of Lucas, and complainant being thus led to believe that he was still liable for the debt, agreed to execute the required bond; that whilst the bond was preparing, Testator *said he had been obliged to pay complainant's debt to the estate*, and that, therefore, the bond should be granted to testator in his own name; and that the bond was accordingly executed on the 10th November, 1838, for the amount agreed on, *viz.*, 5,500 dollars; that

after the death of the testator, the defendant as his Executor brought an action against complainant on the said bond, viz., on the 1st November, 1842; that *sometime thereafter complainant learned for the first time* that the testator had received the said dividend; and he now charges that the said bond was obtained by *fraudulent concealment of fact and mis-representation*, and is therefore *invalid*; and he, therefore, prays relief, and that the defendant may be called upon to declare on oath all that he knows of the matter; and then follows a string of interrogatories in the usual form.

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The answer of the defendant admits in substance the truth of the allegations in the bill as to the meeting of creditors, the deed of assignment, and the schedule and testator's receipt of dividend on his own debt, but states his belief that the testator *never did receive* the dividends due to Mrs. Carapiet and to himself as Executor of Lucas, or either of them; admits also the execution of the bond by the complainant to the testator, but, whether the consideration was different from what appears in the bond, or whether the complainant was induced by the representations alleged, to sign the bond he does not know, but, that the complainant might have easily ascertained, whether the testator had received the said dividends or not: admits that he has obtained judgment at law, but submits that if the bond was obtained as alleged by fraud, complainant might and ought to have pleaded the same in bar to the action; and lastly declared his belief that the bond was obtained without fraud and for a good and valid consideration.

With regard to the observation that the alleged fraud should have been specially pleaded in bar to the action, a sufficient answer is furnished by the defendant's affidavit that the fraud was for the most part unknown to him till after the commencement of the action; the fact that previous to pleading the general issue he had moved for leave to file a bill of discovery as necessary to his defence; and the understanding that the trial at law should be proceeded with, *subject* to the result of such bill in equity. It should be remembered also, that when complainant's agent was proceeding to cross-examine the witness, who proved the execution of the bond as to the *circumstances* under which the bond was given, the cross-examination was objected to by the agent on the other side, and the objection, perhaps, too readily allowed. On consideration, I am inclined to think that the cross-examination was quite regular and that the disallowance of it might have afforded sufficient ground for a new trial.

The principal witness called by the complainant was Mr. Geo. Scott, whose evidence was taken *de bene esse*, as he was on the eve of proceeding to Europe. The witness was objected to at the time on the ground that he was *interested* in the event of the suit and might avail himself of the decree in any subsequent proceeding against him to recover the dividend, the payment of which he was called to prove. The interest was not sufficiently apparent, and the other objection, on reference to the Act IX. of 1840, was temporarily overruled; but the point was reserved. On the hear-

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ing of the cause the other day, Mr. Scott's deposition was tendered in evidence, but again objected to on the grounds above stated. For the defendant, Mr. Baumgarten cited several cases of actions for damages occasioned by negligent driving, in which the evidence of servants on behalf of their masters had been held inadmissible on the obvious ground that they had a direct interest in the event of the suit by throwing off the imputation of negligence from their own shoulders upon those of the defendants. I do not mention these cases in detail, as in my opinion they are quite inapplicable. Mr. Scott had no interest, for aught that has appeared, in the success of either plaintiff or defendant in the suit. But then, it was contended, he might avail himself of the judgment of the Court in any future action or suit to be brought against him by the creditors for the amount of the dividend which according to his evidence had been paid to the testator. But the judgment or decree would not be evidence for him in such an action for three reasons,—firstly, that, as Mr. Logan observes, he would thus, in contravention of one of the first principles of evidence, be made a witness in his own cause; secondly, that the parties would be different, whereas, verdicts and judgments are only evidence for or against the *same parties*; and, thirdly, that judgments are only conclusive between the same parties upon the *same matter*, and not upon any matter which come collaterally in question nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. Besides, whether the judgment would be available in another suit or not, I conceive that the Legislative Act IX. of 1840, renders the objection nugatory as a bar to the reception of the evidence in the present suit. Some cases indeed, cited by Phillips in the last edition of his work on Evidence, have been referred to, from which it appears to have been ruled in the Courts at Westminster that the Statute 3 and 4, Wm. IV., on which the Indian Act is founded, was not intended to apply to Courts of Equity. But the cases upon that Statute are, as admitted by Mr. Phillips, full of difficulty and not easily reconcilable; and it should be remembered that the Indian Act was passed seven years after the Statute with full knowledge or the means of full knowledge of the conflicting decisions upon the subject, and that the terms employed are general, *viz.*: “if any witness shall be objected to in *any of Her Majesty's Courts, &c.*,” without reference to the separate jurisdictions of law and equity, whereas, the provision in the English Statute is expressly limited to the “Courts of *common law.*”

Mr. Scott's evidence then, I think, was on every ground admissible. The details of that evidence, I need not again recapitulate, as it is familiar to the parties and I have already expressed my opinion, which I see no reason to alter, that it is substantially true. I believe, then, as I have already stated, that Mr. Galastaun did receive the dividend due to him as Executor of Lucas's Estate, and having so received it he virtually assented as such creditor to the terms of the composition deed, and there was no necessity for him to sign his name over again at the foot of

the deed. His signature was *general*, and as such bound him not only as trustee, but as creditor also from the moment he received his dividends. A case cited by Mr. Baumgarten himself supplies a sufficient authority on that point. In the case of *Lewis v. Jones*, 4 B. and C. 512, Mr. Justice Bailey observes: "If a creditor signs an instrument *generally* he becomes a party to it unconditionally, and then the legal effect of the instrument must be collected from the instrument itself, and not from verbal declarations made by the parties at the time they executed it." As Mr. Galastaun, therefore, after the receipt of the dividend, became subject to the same conditions as any other creditor who had signed the deed of composition, the question then arises, whether his subsequent proceedings with regard to the mortgage bond in question were or were not a violation of the deed and a fraud upon his brother creditors, or at least upon the complainant. As regards the creditors, the cases from 4th and 9th B. and C., cited by Mr. Baumgarten in explanation of that of *Cockshott v. Bennett* in 4 T. R., certainly tend to shew that in order to sustain the argument of a fraud upon *them*, the mortgage bond in question must appear to have been executed or agreed upon *at the time*, when the composition deed was assented to; but there is nothing in those cases to prevent the operation of the defendant's breach of his covenant not to sue, &c., by which the bond became void. Nor do they affect the question as regards the complainant, who charges the defendant with having obtained the bond from him by *mis-representation* and *fraudulent concealment*. The evidence in support of this charge is the testimony given by Mr. Norman McIntyre and Mr. Wm. Anderson. The latter gentleman declares that in a conversation with the deceased at Calcutta, shortly before his death, Mr. Galastaun admitted that the bond, though granted to him in his own name, was in effect for the debt due to him as Executor of Lucas. This corroborates the testimony of Mr. N. McIntyre on that point, who declares that the deceased requested that the bond might be so made out, although surprise was expressed by the witness and his brother, the complainant, at the time. And how did Mr. Galastaun overcome their scruples in this respect? By representing that he had himself been obliged to pay the complainant's debt to the estate. Was this true or was it not? If untrue it was certainly a mis-representation for the obvious *purpose* of inducing the complainant to sign the bond. Now had it been true some notice of the payment should have appeared in the estate papers of Lucas. But, there is none, and the presumption therefore is that the assertion was untrue, especially as Mr. Galastaun was not, as he asserted, under any *obligation* whatever to pay off the complainant's debt to that estate. But, whether or not, the fraudulent *concealment* of the fact that he had received the dividend is plain from Mr. N. McIntyre's evidence, and that in my opinion is alone sufficient to vitiate the bond. Had Mr. Galastaun been only an ordinary creditor, I should still have thought this concealment sufficiently condemnatory, but standing as he did in the situation of a *trustee*, and as such especially bound to disclose a fact of so much importance to

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1848. the complainant and of which the latter was obviously ignorant, the fraud has a darker aspect.

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GALASTAUN. A case has been cited on behalf of the defendant to shew that there is no fraud in mis-representing the *legal effect* of an instrument to a person who has signed it, since every man must be presumed cognizant of the legal effect of any instrument to which he affixes his name; but, I am at a loss to know how that case applies here. Two cases were also cited from 2 Vernon, to shew that a fraudulent *debtor*, is no more entitled to relief in equity than a fraudulent creditor—but here again I cannot perceive the applicability of these cases. So far from intending to defraud his creditors the complainant was himself deceived. Lastly, it was contended that the complainant being under a moral obligation to discharge the debt, the defendant was not justly chargeable with fraud in obtaining additional security for that debt, even admitting him to have resorted for that purpose to the misrepresentation and concealment complained of. I have so little doubt upon the subject that it is hardly necessary, I conceive, to cite authorities; but as it may be more satisfactory to the parties to do so, I refer with pleasure to the book principally relied on by Mr. Logan for the complainant, the work of the American Jurist, *Dr. Storey's Commentaries on Equity Jurisprudence*, which I have the less hesitation in doing as the learned writer's positions on this head are almost entirely founded upon or at least easily deducible from or reconcilable with English authorities. "Fraud," said Lord Hardwicke as quoted by Dr. Storey, "is infinite and "were a Court of Equity once to lay down rules how far it would "go and no further in extending relief against it, or to define "strictly the species or evidence of it, the jurisdiction would be "cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive." "Fraud," continues the learned commentator, "in the sense of a Court of Equity, "properly includes all acts, omissions and concealments which "involve a breach of legal or equitable duty, *trust*, or confidence, "justly reposed, and are injurious to another, or by which an undue "and unconscientious advantage is taken of another." Again, as belonging to an extensive class, he refers to "cases where one "party is under some obligation to communicate the facts or where "there is a peculiar known relation, *trust* or confidence between "them, which authorizes the other party to act upon the *presumption that there is no concealment* of any material fact." Authorities to the same effect might easily be multiplied, but this cannot be thought necessary.

My decree is that the bond be delivered up and cancelled as fraudulent and void, and that the defendant be enjoined from all further proceedings with reference to it at law. The defendant to pay the full costs incurred by the complainant in defending the action, and in prosecuting his bill.

F. S. BROWN & ANOR. v. KAM KONGAY & ANOR.

The Court will not allow interest on a judgment, for any interval of time intervening between the date of judgment, and payment thereof.

The Statute 8 and 9 Wm. III., c. 11, s. 8, does not apply to a simple money bond.

PENANG.

NORRIS, R.

1844.

August 13.

This was an action to recover \$2,000, besides interest, due on a bond. The defendants had allowed judgment to go by default and the matter now came before the Court, for assessment of damages.

C. *Baumgarten* for plaintiffs claimed interest on the debt after judgment entered and up to day of suing out execution, or of satisfaction. The practice he stated [and in this he was borne out by the Registrar] to allow interest only up to the day judgment was entered, whether execution issued immediately or eleven months after—but was never, in practice, allowed for any period which transpired after date of judgment.

Norris, R. The petitioners are only entitled to interest up to the date of judgment. The Statute 8 and 9 Wm. III., c. 11, s. 8, which enacted that in debt on bond the judgment should stand as security for “further damages” arising from “further breaches,” &c., does not apply to the case of a simple money bond like the present, where there is, and can be, but one breach—the non-payment of the stipulated sum. Besides, had the Statute been applicable, the plaintiffs should have proceeded differently, by suing for the *penalty* [they sue only for the sum due] and assigning and proving breaches according to the form, see the notes to the cases of *Gainsford v. Griffiths*, 1 Saund 58, and *Roberts v. Mariott*, 2 Saund 187, where the history and form of proceedings on the Statute are detailed at length. There will be judgment for the plaintiff for \$2,000, for principal, besides interest, up to this day, and costs of suit [a].

EAST INDIA CO. v. JAMES LOW.

The right that the Government has to distrain for arrears of quit rent, does not deprive them of their right to sue the tenant at law for the rent: the remedies are cumulative.

Where a person has, on accepting a grant of land from Government, covenanted to pay quit rent annually, without any exception as to circumstances, he is bound to pay the rent, although the lands may subsequently turn out useless, and are abandoned by him.

PENANG.

RAWLIN-

SON, R.

1848.

June 15.

This was an action to recover \$258.96 arrears of quit rent of certain lands in Province Wellesley granted by the plaintiffs to the defendant in fee, [by grant No. 3678, dated 30th April, 1833] subject to an annual quit rent which increased at stated periods until a given time, when thereafter the quit rent was to be at Rs. 2 per orlong. This quit rent was to be “under the Rules

[a] This decision must be considered overruled by Ord. 2 of 1884, and is only reported as shewing that prior to that Ordinance, interest was not chargeable on judgments, a point considered uncertain, in ignorance of this decision.—J. W. N. K.

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"prescribed for the issue of titles, A. D. 1831. Regulation I." It appeared that the defendant finding the land useless, abandoned it and refused to pay these arrears of quit rent. On the 10th July, 1847, a notice was served on him requiring him to pay the same within 15 days and proceeded, "that in default of payment " within the period specified, the amount of the said arrears, to- " gether with costs of process, will be recovered under the powers " of Act XVI. of 1839." This notice was signed by the Assistant Collector at the Land Office, Province Wellesley. The defendant still declined to pay, the land being mere jungle and uncleared ground, no distress could be found there. There was no clause in the grant for the property to revert to Government in default of payment of quit rent. This action was therefore brought. The defendant pleaded first plea he did not owe the money, and by way of a second plea, "the plaintiffs ought not to have or main- " tain their aforesaid action against him, because he says, that by " reason of the arrears of quit rent in the petition alleged remain- " ing three years unpaid, the land mentioned in the petition is " alone liable for such arrears, and is resumable to the plaintiffs " by virtue of the Regulation prescribed for the issue of the title " under which this defendant holds his said land, to wit, Regula- " tion I., A. D. 1831, and this he prays the Court to enquire, " &c." The plaintiffs demurred to this plea as being insufficient in law: the defendant joined in demurrer. By sec. 8, cl. 3 of the Regulation 1 of A. D. 1831, it is enacted "all persons holding " lands, shall, after the date of this Regulation, be responsible for " the annual quit rent thereon, registered in their names, and " Government shall be at liberty to distrain on the premises for " annual arrears of rent without application to the Court of Judi- " cature, but the land itself being ultimately held liable for the " quit rent; in case of its remaining three years unpaid, the " lands shall be resumed by the Government."

J. Ferrier, the Assistant Collector, for plaintiffs.

S. Herriot, as special agent for defendant, contended, I.—that as the deed was a mere grant, not a deed *inter partes*, and not signed by the defendant, he was not liable thereon; II.—that the regulation was part of the grant, and by sec. 8, cl. 3 the remedy was confined to distress, and after the third year, forfeiture; III.—that there was an implied condition that the land was capable of cultivation—it was not so—it was generally jungle, inaccessible to either party. The action was for rent, but rent was money issuing out of the land, therefore profit—here there was no profit, the land was useless to the defendant and he had abandoned it. Unless there was a beneficial occupation, no rent could be claimed. *Edwards v. Etherington*, R. & M. 268, and *Collins v. Barrow*, 1 Moody and Robinson, p. 112.

Rawlinson, R. I give judgment for the plaintiffs on the grounds that the first objection is not tenable. On general principles, a landlord's title cannot be disputed by a tenant, or the objection should have been pleaded by "*non est factum*," and was unavailable on "*nil debet*" as had been pleaded in this case. Comyn's Tenant Law, p. 469, [*Ed.* 1821] and *Hodson v. Sharpe*,

10 East 350. As to the second objection, I rule that the liberty to distrain did not deprive the plaintiffs of their right of action of debt at common law, and the demurrer must be allowed. As to the third objection, the cases cited were *Nisi Prius* cases, and for use and occupation: the present action is founded on defendant's covenant to pay rent, which is binding on him, under all circumstances; *Baker v. Holpsaffel*, 4 Taunt 46; *Brown v. Qurlow*, Ambler 621; Goodale's case, Dyer 14, and *Moule v. Cooper*, 1 Ld. Raymond 1477.

Judgment for plaintiff with costs.

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BROWN v. MUNICIPAL COMMISSIONERS.

The appellant, the owner of extensive lands in the Settlement, rented a large portion of such land to tenants, and kept the remainder in his own occupation: he employed an agent to superintend the whole of these lands including those let out to tenants, and paid this agent \$6,000 a year. He claimed that this sum under Act. IX. of 1848, should be deducted from the rent of the lands let, as well as from the value of the net produce of the lands in his own occupation.

Held, that no deductions could be made from the rent, as assessment was directed by s. 3, to be charged on the "actual rent," but a reasonable portion of such sum, for the superintendence of the lands occupied by himself, should be deducted from the value of the gross produce of such lands.

The words "outlay actually paid and expended upon the land," in the 5th sec. of the said Act means, an expenditure which is of such a nature as will give value to the land, or is instrumental in producing the gross value; the assessment therefore paid on a house built on the land, and quit rents paid to Government on the land, are neither of them items which can be properly deducted under that section, in order to ascertain the value of the net produce on which assessment is chargeable.

Principles of rating discussed.

This was an appeal heard at "Quarter Sessions" against certain assessment fixed by the Municipal Commissioners on certain lands of the Appellant. The facts and points sufficiently appear in the judgment, so as not to require a statement of them here.

The parties appeared in person, and the judgment of the Court was delivered by

Jeffcott, R. This is an appeal, on behalf of Mr. D. W. Brown, against an assessment levied on his lands pursuant to the provisions of "Act IX. of 1848," on the ground that certain deductions, to which he considered himself entitled, were not made from the amount of that assessment.

The 3rd sec. of that Act enacts that a rate, not exceeding 5 per cent., shall be levied half yearly or annually "upon the actual rent, or upon the value of the net produce, derived from all lands," &c.

The 4th sec. enacts, "that in order to ascertain the value of the net produce of any such lands for any one year or half year, for the purpose of levying such assessment, the amount of outlay actually paid and expended, during that period, in and upon the lands yielding such produce, and in the manufacture of any such produce, [not including either the purchase money of such lands, or the original outlay thereon, or the cost or purchase money of any articles of machinery used or employed, or of any buildings erected thereon,] shall be deducted from the estimated

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JEFFCOTT, B. "value, at the then local current rate, of the gross quantity or
1850. "amount of produce, whether manufactured or otherwise derived
BROWN "from such lands, and that upon the overplus or net balance
v. "value, the assessment shall be levied and paid."

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The 5th sec. enacts that, in order to facilitate the collecting of assessment in manner specified in sec. 4, the Collector may require the owner or other person in charge of the said lands to furnish him, either annually or half yearly, with a true and detailed statement of the gross produce yielded by, or manufactured from land during either of said periods—"and likewise a true and detailed statement of the amount of actual outlay paid and expended in the cultivation of the said lands, and in the preparation or manufacture of the produce thereof, during the like periods," &c.

Mr. Brown first claims to be allowed a sum of 6,000 dollars paid, as his yearly salary, to an agent for superintending the whole of his lands. It appears from the statement furnished by Mr. Brown's agent, that a large portion of those lands is let to tenants at fixed rents—the remainder is in Mr. Brown's own occupation. The salary is claimed in respect of the superintendence of the lands let to tenants as well as of those in Mr. Brown's own occupation.

The Municipal Committee, to whom the expenditure of the sum collected is entrusted, were willing to allow a reasonable sum for the superintendence of the portion of the lands not let to tenants, and proposed 3,000 dollars. That sum Mr. Brown refused to accept, and insisted on his right to deduct the full sum of \$6,000.

The Court are of opinion that, in determining the amount of assessment to be levied on Mr. Brown's lands, no deduction whatsoever can be made from the actual rent of the portion of the lands let to tenants, as the Act directs that the assessment is to be levied upon the actual rent, and no deduction is authorized by the Act to be made from it. And that, with respect to the portion of the lands in Mr. Brown's own occupation, those deductions only can be made which are specified in the 4th sec. of the Act.

As no objection is made to allowing, out of the salary paid to the agent a reasonable sum for the superintendence of the latter portion of the lands, it being considered that the expense of such superintendence should be deemed a part of the necessary outlay upon that portion of the lands, if the parties cannot agree as to the sum, the Court must hear evidence to determine what sum would be reasonable for the management and superintendence of that particular portion. Mr. Brown next claims to have deducted from the value of the gross produce of that portion of the lands in his own occupation, the amount of the assessment which he paid on the rent of Glugore House—[the mansion house of the estate in which his agent resides] which amounted to 60 dollars—the rent being estimated at \$600. The assessment on houses is directed to be levied by the same Act [No. IX. of 1848] as the assessment on lands—and no houses whatsoever are excepted from the assessment except certain public and private buildings specified in the

schedule. Mr. Brown admits that his house is not one of those buildings mentioned in the schedule and that it was properly assessed—but he claims that the sum he paid for that assessment on his house should be deducted as part of the outlay actually paid and expended on his lands, as the house was his agent's residence, but it is impossible to put such a construction on the 4th Section of the Act.

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The house and lands are selected by the Act as distinct and separate objects of taxation—each pays its own assessment, and for the purposes of the Act they are to be deemed as distinct and separate as anything can be.

The Court are of opinion, that the assessment paid for the house cannot be considered, in any sense, as part of "the outlay actually paid and expended in and upon the lands," that the obvious meaning of those words is, that the expenditure is to be of such a nature as will have some effect in giving value to the land—that the deduction from the gross value is to be of such outlay as was instrumental in producing it, and such as a tenant should take into consideration in determining the rent to be paid for the land, such is the restricted meaning given to the words "actual outlay" in the 5th Section,—and even though disposed to give the most liberal construction to the words; still it would be too remote an inference, that, because the land required the superintendence of an agent—and the agent required a house, and the house required a tax to be paid for it—therefore the tax so paid, had a remote effect upon the value of the land, and should be considered as part of the outlay on it.

The meaning we have given to the words of the 4th section disposes of the claim of Mr. Brown with respect to all the other assessments on foot, of which he required deductions, and we are of opinion that those deductions should not be allowed—all those assessments are imposed by the same Act as the assessment on land, and on the different objects selected for taxation—and the Act contains no provision that the sum paid for the assessment on any one of those objects, shall be used in diminution of the assessment to be paid on any other of them, nor does the Act contain any provision that rates and taxes should be deducted for the purpose of ascertaining the net value, the fact being that there are no rates or taxes which could be deducted save those imposed by the Act itself, no previous Act having imposed any.

The last claim of Mr. Brown is for a deduction of the amount paid by him for quit rents, and we are of opinion that the claim should not be allowed—the only deduction authorized by the Act is "the amount of outlay actually paid and expended on the lands," and we have given a construction to those words which excludes quit rents.

Besides we are of opinion that allowing it to the landlord would introduce "inequality," as the tenant is presumed to be charged with it in his "actual rent," and it has never been the practice in England to deduct them, as land tax, quit rents, and ground rents were considered landlord charges, which he included in the rent, and if he were to be allowed to deduct them, while

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the tenant paid according to the amount of actual rent, inequality would be introduced. It may be deemed satisfactory to cite a few English cases, to shew that the principles which have regulated the decisions of the Courts in England upon rating Acts, have been adhered to in framing this Act, with such alterations as suited the circumstances of this Settlement. Most of those decisions have been upon the Act for relief of the poor.

The 43rd Elizabeth, c. 2, [considered the first Act for the relief of the poor] uses the most general terms, and merely directs that a rate shall be raised, by "taxation of every occupier of "lands, &c., in the parish" nothing is said in that Act as to the principle upon which the rate was to be made—whether it was to be made according to the respective values of the lands—but judicial decisions soon determined that it should be so made.

In subsequent rating Acts, a direction is introduced that the rate shall be made according to the respective values of the lands—and finally judicial decision determined that the "value" intended was the "net annual value" and that the following were the modes in which that value was to be ascertained.

If the land were let to a tenant at a rack rent, that the best criterion of the "net annual value" was the rent paid for it—and if not let to a tenant the rent which might reasonably be expected for it.

To ascertain this latter rent they determined that the value of the gross produce should be ascertained, and that the cost of cultivation, tenants' rates, and other outgoings should be deducted, and that the balance should be deemed the rent which might be reasonably expected.

That when the land was let to a tenant there was no necessity for making any calculations or deductions as the "rent" he paid was the measure of the "net annual value" of his lands.

When the land was not let, but kept in the owner's own occupation, it was necessary to make calculations and deductions to ascertain what rent the owner should be charged so as to put him on an equality with the tenant.

In *R. v. Hull Dock Co.*, 3 B. & C. 527, Abbot, C. J. says: "The whole value is made up of what is paid in rent, and what is rates, and other outgoings. Land intrinsically worth £40 a year can only pay a rent of £30 if it is to pay £10 *per annum* in other ways—and on estimating a rent both landlord and tenant look to the value of the thing on the one hand, and to the outgoings on the other, and the outgoings must be deducted from the value before the rent can be properly fixed."

In *R. v. Duke of Bridgewater*, 9 B. & C. 72, Bayley, J.: "If land be occupied by a person, as a farmer, the value of the occupation is the rent paid by him for it. The principle of our decision in the case is that the same rule is to be applied to all occupiers, and that the rent or sum at which the land will let is the criterion of the value of the occupation."

And in *R. v. London and South-Western Ry.*, 1 Q. B. 586, Lord Denman says: "From the time of the decision of the case of

"*Rex v. Trustees of the Duke of Bridgewater*, it has been generally understood that, fraud apart, the rent, whether the occupier was the owner, or only the tenant, in the former case a supposed, in the latter a real rent, was to be the criterion of "rateable value."

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From those and numerous other cases it appears to be the established principle of rating lands in England, that, whenever the land is let to a tenant, the actual rent, without any deductions whatsoever, should be deemed the criterion of the net annual value, the presumption—is that the tenant, before he fixed his rent, made all the necessary deductions for outgoings, and when the land is not let to a tenant but kept in the owner's occupation, that then such deductions should be made, from the gross value of the produce, as would charge the owner with a rent equal to that paid by his tenant supposing their lands to be equally productive. The great object in all cases being that the rate should be equally charged upon all according to the respective values of their properties.

This principle of rating, namely, considering a real or supposed annual rent the criterion of rateable value, has been applied to every description of rateable property—houses, shops, mines, canals, railways, saleable woods, manufactories, &c., and the great difficulty the Courts had was to determine, in applying the same principle to such various descriptions of property, which were the proper deductions to be made, for the purpose of ascertaining the fair annual rent, for each kind of property, when it was not actually let to a tenant.

At length the Legislature interfered, and the 6th and 7th, Wm. IV., c. 96 was passed, whereby, after reciting "that it was desirable to establish one uniform mode of rating for the relief of the poor throughout England and Wales" it was enacted that no rate should be allowed "unless made upon an estimate of the net annual value of the several hereditaments rated thereunto: that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, tithe commutation and rent charge, if any, and deducting therefrom, the probable average annual cost of the repairs, Insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." Since the passing of the above Act, the Courts are coerced in all assessments, to which the Act applies, to make the deductions specified in the Act and no others. The Courts have no discretion. The deductions specified must be made, no others can.

The Act, however, as Lord Denman says, in *R. v. London and South-Western Ry.*, "introduced no new principle of rating," it merely specified for the convenience of the Courts and all parties what, according to the old established principles of rating, should be the deductions from the gross value of rateable property, for the purpose of determining the net annual value, or the rent.

Those deductions have been deemed so reasonable, that they have been recommended by the Judicial Committee of the Privy Council, to be adopted for the purpose of ascertaining the rent,

JEFFCOTT, R. which could be reasonably expected, in a case where the Act 33, 1850. Geo. 3, c. 50, "for watching, cleansing and repairing the streets "of Bombay" merely directed that the assessment should be levied in specified properties "according to the true and real annual values thereof."

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And in all cases when the Act imposing the rate uses general words "according to the annual value," without directing how that value is to be ascertained, those deductions would be proper.

In this Settlement, the first Act directing an assessment to be levied on lands "Act No. 12 of 1840" enacts, that it shall be levied on all lands, according to the real annual values thereof.

Those were the words used in the English Acts, and, according to the English decisions, the "value" should be ascertained—if let to a tenant—by the actual rent paid—if not let to a tenant—by the rent which might be reasonably expected, and which was to be ascertained by making certain deductions from the gross value of the produce.

What those deductions should be was left here, as in England, to the decision of the Courts, as long as general words were used in the Act imposing the rate—but it was thought more convenient here, as in England, to specify the deductions and accordingly "the Act No. 9 of 1848" was passed, enacting that "the assessment on lands shall be levied half yearly or annually" on the actual rent, or "upon the value of the net produce, derived from all "lands" and, in order to ascertain the value of the net produce, certain deductions specified in the Act are directed to be made and no others can be made. The appeal will therefore be dismissed.

MILES v. ABRAHAM LOGAN.

SINGAPORE.

JEFFCOTT, R.
1851.

October 2.

It is no defence to an action of libel, that the article was copied from an English newspaper which had been some months already in circulation, and was a Report of a debate in the House of Commons, on a matter of interest in this Colony.

The defendant, the Editor of a newspaper, knowing that the article contained certain libellous statements against the plaintiff, intended, in publishing such debate, to have omitted such libellous statements. He handed the newspaper to his printer with the debate marked out, but without any instructions as to the libellous statements, intending himself to correct the proof sheets, and then to strike out these passages. Through an accident, he omitted to correct the proof sheets, which were revised by the printer only, and published in *extenso*.

Held, he had shewn great carelessness and a want of due regard for the feeling of others; and \$200 damages, with costs, were awarded against him [a].

This was an action of libel. The circumstances giving rise to it are fully set out in the judgment.

R. C. Woods, sen., for plaintiff.

A. M. Aitken for defendant. The publication by the defendant was entirely unintentional and could not therefore be libellous,

[a.] The joint opinion of Lord Chelmsford [then Sir Frederick Thesiger,] and Mr. Justice Hill [then Mr. Hugh Hill] was taken by defendant after this judgment, with a view to an appeal to the Privy Council; but their opinion being in accordance with the judgment, and against the defendant, the matter dropped.—J. W. N. K.

intention and malice being essential ingredients in libel. In *Rez v. Lord Abingdon*, 1 Espinasse 228, Lord Kenyon laid down "that in order to constitute a libel, the mind must be in fault and shew a malicious intention to defame, for if published inadvertently it would not be a libel." In this case the publication was accidental, the defendant not being aware that the passage objected to formed part of the abridged report copied into the *Free Press* until he saw it after publication, when he immediately explained to the plaintiff how it came to be there.

JEFFCOTT, R.
1851.
MILES
v.
LOGAN.

Cur. Adv. Vult.

October 6. *Jeffcott, R.* This is an action brought by the plaintiff, to recover damages from the defendant for the publication of a libel. The damages are laid at \$5,000. The defendant pleaded the general issue.

The article complained of was published in a newspaper called the *Singapore Free Press*, on the 5th day of September last. It was admitted at the trial, that the defendant was then the Editor of that newspaper, and that he published the article complained of. It was proved at the trial, that the words complained of were copied by the directions of the defendant, from that portion of the London *Examiner* newspaper, of the 12th July last, which purports to give a report of a debate in the House of Commons on a motion of Mr. Hume, and is headed "Charges against Sir James Brooke." The passage said to contain the libel is as follows:—

"Sometime ago there appeared in the *Daily News* a letter written by a Mr. Miles, the same gentleman he [the speaker] believed, whom the Honorable Member had that evening referred to, as author of a letter, without naming him. Mr. Miles was a gentleman who followed the occupation of a butcher, with which he united the more honorable profession of a boxer; and it happened that owing to a little misfortune, he went abroad at the Queen's expense."

It was proved at the trial, by a person who read those words, that he understood them to mean that the plaintiff had been transported as a felon; and the defendant's own witness, Dr. Little, proved, that the defendant had stated to him previously to the publication of the article complained of, that it was not his intention to publish the whole debate, as it appeared in the English papers on the charges against Sir James Brooke, as if he did so, "he should immediately be brought up for libel."

Coupling that statement with the note which he wrote to the plaintiff immediately after the article containing the debate had been published, it is quite clear that the defendant felt convinced that the article contained a libel on the plaintiff.

The old rule that the words are to be understood "*in mitiori sensu*" having been long since superseded, and the rule now being, that the words are to be construed by the Courts, [as they always ought to have been] in the plain and popular sense in which the rest of the world naturally understand them, in my opinion

JEFFCOCK, R. those words mean, in the plain and popular sense, that the plaintiff was transported, having been convicted in a Court of Justice of a transportable offence.

1851.

MILES

v.

LOGAN.

The plaintiff having thus established that a libel upon him had been published by the defendant as stated in his petition, and that being the only issue on record between the parties, the Court is bound to give a verdict for the plaintiff.

It only remains that the Court should determine what damages should be awarded to the plaintiff, having given due consideration to the mitigating circumstances relied upon by the defendant.

He first alleges, that the publication was unintentional,—and if his own statement that he did not intend to publish the libellous matter can avail him,—as the plaintiff did not object to its reception,—it appears that he did make such a statement to Dr. Little previous to the publication; but whatever his intention may have been, it is quite clear that he did not use those precautions which would have effectually prevented the publication of the libel; and it is also clear, that it was his peculiar duty, as editor of the newspaper, to have used those precautions, and to have taken care that the libellous matter to which his attention had been so particularly called, should not appear in its columns.

That duty he wholly neglected, and under circumstances which shew great carelessness, and a want of due regard to the feelings and characters of others.

The printer, who was called as a witness by the defendant, proved, that the defendant having marked for publication the whole of the article in the *Examiner* containing the debate on “the charges against Sir James Brooke,” handed the article, so marked, to the witness [his printer] to be printed for the next *Free Press*; and that it was accordingly printed and published in that newspaper as it now appears. It is true that the same witness proved that the defendant went to the country after he had handed him the article so marked to be printed, and that the defendant did not afterwards read the proof sheets, which were revised and corrected by the printer himself, and thus the libellous matter which it was intended to omit, had not been omitted—but I feel no hesitation in saying, after the defendant’s statement to Dr. Little previous to the publication, that if he introduced into his paper a particular debate as it appeared in the newspapers he read, “he should immediately be brought up for libel,” that he was guilty of very gross carelessness in omitting to read the newspaper from which he ordered the debate to be extracted, or the proof sheets which related to that particular debate.

“To run the risk of effecting a serious injury to another, even from want of due care and attention [to use the words of “Mr. Starkie] is necessarily an offence against the first principles of morality; and even were it otherwise, it would be highly impolitic and inconvenient, as a rule of law, to permit any man to destroy the characters of others, provided he was not actuated “by motives of express malice, but acted without consideration, “heedless of consequences.” 1 *Stark: on Libel*, 211.

The defendant next relies upon his having expressed his regret that the article appeared in his newspaper, in a note addressed to the plaintiff, bearing date the 5th September [the day on which the libel was published,] and forwarded immediately after its publication, and before the plaintiff had applied to him on the subject, [here his Lordship read the note]. That note in my opinion was not such a note as ought to have satisfied the plaintiff—it expressed no belief that the libel was false, nor did it contain any offer to assist in removing from the public mind the impression that the libel was calculated to make,—namely, that the plaintiff had been transported as a convicted felon. It merely expressed regret that the libel appeared in the defendant's newspaper, that the defendant had intended to omit it, and that he was ready to insert a paragraph to *that effect*—[thus strictly defining the sort of paragraph he was ready to insert,] in the next week's *Free Press*, and that the plaintiff was in the meantime at liberty to use that note as he may think proper.

JEFFCOCK, R.
1851.
MILES
v.
LOGAN.

The plaintiff having been advised that such a note could not be of any use in vindicating his character, instructed his law agent to commence this action for libel,—and that the defendant may have on opportunity of justifying and of proving, if he would, the truth of the libel. A letter was accordingly written to the defendant by the plaintiff's agent, announcing his intention to commence an action, in reply to which a much more satisfactory note than the former was sent, in which the defendant offers to make every compensation in his power for the injury unintentionally inflicted upon the plaintiff; but as he still omitted to express any opinion as to the truth or falsehood of the libel, he imposed upon the plaintiff the necessity of prosecuting the action.

The plaintiff has resided for some years in Singapore and is engaged in trade; and it is matter of vital importance to him, to remove from the mind of his fellow townsmen, and of those with whom he trades, the impression that he had been a transported felon. The defendant had publicly circulated a statement to that effect, and he did not offer, in any of his notes, to make any public declaration as to its truth or falsehood.

The plaintiff was therefore obliged for the vindication of his character to bring this action by which he challenged the defendant to prove the truth of the libel. The defendant has not attempted to allege or prove that the libel is true, and the Court, and all others, are therefore bound to presume that it is false. The plaintiff has thus done everything he could do for the public vindication of his character. The rules of the Court did not permit him to *prove* the falsehood of the libel, as the defendant had not alleged that it was true; but it is always presumed in such cases, that the defendant would have alleged and proved its truth if he could have done so, as he would then have saved himself from the payment of damages. Lastly, I am bound to consider in estimating the amount of damages, under what circumstances, and in what character, the defendant published the libel, and what the libel was. The defendant is the Editor of a newspaper, and he published the article in the discharge of

JEFFCOOTT, B. 1851.
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v.
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his professional duty as such. He was not the original author, or the original publisher. He merely copied *verbatim* from another newspaper the article in question, purporting to be the Report of a debate in the House of Commons. The publication of the debates in both Houses of Parliament is a great public advantage, and as the publication may be said in some respects to be sanctioned by both Houses, the public require that each newspaper shall contain a report in some shape, of those debates which interest the neighbourhood in which it is published. It was therefore the duty of the defendant to insert, in some shape, this debate which had a peculiar interest for this locality. It is true that he acted with great carelessness in allowing it to appear in its present shape, and that is the full amount of his offence. There appears to be an absence of any malicious intention in which the crime of Libel consists. He headed the article with the name of the newspaper from which he copied it, and he did not add one word of comment, nor did he make any allusion to it in his Editorial article. If an editor, in an Editorial article, publish a Libel on another, he is justly held to be bound to make full compensation to the injured party. He composed and published the Libel, or is justly presumed to have done so, and he must pay the full penalty for the injury thus inflicted; but on the present occasion, the defendant carefully abstained from any allusion to the debate in his leading article—he copied the report as it appeared in the *Examiner*, without altering a single letter—and he did not publish that report until some months after its original publication and until after it had appeared in several thousand different publications, and had been circulated throughout the globe. For all that wide spread circulation the defendant is not to blame. It also appears, that the defendant did not publish, until several days after the libel had been published in Singapore, by the circulation of the English newspapers, so that the only additional injury to the plaintiff which could have been caused by the publication in the *Free Press* is, that some few persons who have no opportunity of seeing the English newspapers, may have read the libel in the *Singapore Free Press* after it had been previously widely circulated through the town—and I am bound to consider, that although the offers of the defendant to make reparation were not such as the plaintiff under the circumstances could have accepted, yet that they shewed a disposition in the defendant to make reparation, that he published the correspondence, in which he expressed his regret, and his offer to make reparation in the first newspaper which was published after the libel appeared, and that his not having offered reparation to the full extent which ought to have satisfied the plaintiff, may have arisen from his not knowing what he ought to have offered. I do not think, under all the circumstances of this case, that the Court would be justified in exacting from the present defendant, [as if he had been the person most guilty in circulating this libel,] full compensation for the injury inflicted on the plaintiff; and from the nature of the libel there can be no doubt that injury has been inflicted. The defendant has proved

that he acted with gross carelessness, and therefore the verdict must be for such amount as may hereafter deter persons, similarly circumstanced, from shewing such a disregard for the feelings and character of others. I think the plaintiff was rightly advised, and that he was compelled under the circumstances to bring this action, but the defendant is not the person from whom he ought to expect, or against whom the Court ought to give exemplary damages.

JEFFCOTT, R.
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Verdict for plaintiff two hundred dollars with costs, but in taxing the costs let the percentage fee paid on filing be taxed as if paid on the amount awarded. [a]

SCOTT, SINCLAIR & CO. v. BROWN & CO.

In the absence of a special agreement, the presumption in the case of Foreign Merchants is, that credit is given to the British agent; but that presumption is liable to be rebutted by shewing that credit was in fact given to both principal and agent, or to the foreign principal only.

PENANG.
—
JEFFCOTT, R.
1852.
—
October 26.
—

When B. & Co. of Penang [defendants] acting on behalf of a constituent, wrote to their agents H. & Co. of Liverpool to procure certain machinery; and H. & Co. in pursuance of such order, entered into a contract with S., S. & Co. [plaintiffs] for the manufacture of such machinery; and the evidence shewed that S., S. & Co. gave credit to both H. & Co. [the British agents] as well as to B. & Co. defendants, [the foreign principals] and not to H. & Co. exclusively,

Held, on the bankruptcy of H. & Co., that S., S. & Co. could recover from B. & Co. the price of the machinery, although B. & Co. had, under the idea that H. & Co. were alone liable to S., S. & Co., paid and settled with H. & Co. the price of the machinery—and notwithstanding that five years had elapsed after the date when the price was due and should have been paid.

The fact that the British agent did not communicate to the foreign principal the terms of the contract he had entered into with the manufacturer, and so led the foreign principal to believe that, in accordance with the usage in trade, credit was exclusively given to the British agent,—does not alter the liability of the foreign principal, if credit has been given him as above—as it was no part of the duty of the manufacturer to convey that information to the foreign principal, but of the British agent only, and for whose omissions in that respect the principal should suffer.

Kymer v. Suwercrop, 1, Camp. 103, distinguished.

If an agent exceeds his authority, his acts, only in so far as they are in excess of authority, are void: but the rest thereof, as are within his authority, will stand, though connected as one transaction with the excess.

Action to recover \$7,512.95, being balance of the price of a Steam-engine and other apparatus of a sugar mill, inclusive of interest. The facts appear so fully in the judgment, that it is unnecessary to state them here.

De Murat, for plaintiffs

J. R. Logan, for defendants.

Cur. Adv. Vult.

November 12. *Jeffcott R.* This is an action for goods sold and delivered, and on the common money counts to recover the sum of Spanish dollars 7,512.95, being the balance of the price of certain machinery manufactured by the plaintiffs, who are steam-

[a] See *R. v. Creevey*, 1 M & Sel. 273; *R. v. Lord Abingdon*, 1 Esp. 286, which cases were referred to in the opinion given by Counsel named in note [a], at the beginning of this case, ante p. 80,

JEFFCOTT, R. engine manufacturers residing in Greenock, for the defendants, 1852. by order of their agents, Messrs. Hossack & Co. of Liverpool.

**SCOTT,
SINCLAIR &
Co.
v.
BROWN & Co.**

The defendants have pleaded the general issue.

It appears from the evidence of Mr. F. S. Brown, one of the defendants, that Mr. James Hossack of the firm of Hossack & Co. of Liverpool was in Penang in the month of November 1845, and that an agreement was then made between Mr. Hossack on the part of his firm and the defendants, Messrs. Brown & Co., under which the defendants agreed to ship a portion of their produce to Messrs. Hossack & Co. to Liverpool, and the latter firm agreed to give the defendants credit in account for 80 per cent. of the invoice prices of such produce. In addition to the produce of their own estates, which are very extensive, the defendants were at that time under an agreement with Mr. Rodyk to ship the produce of an estate belonging to him called the "Krean Estate"; and as it was necessary for the defendants, from time to time, to make advances on account of that estate, it was further agreed with respect to that estate, that Messrs. Hossack & Co. should credit the defendants with two-thirds of all advances made by them on "Krean Estate."

It appears that Mr. Rodyk, in the beginning of the year 1846, having seen on the estate of his neighbour, Mr. Donnadien, a steam-engine and sugar mill, and being anxious to have similar machinery for the "Krean Estate," addressed a letter bearing date the 11th of February, 1846, to the defendants, Messrs. Brown & Co., commencing as follows:—

"DEAR SIRS,

"Being desirous of obtaining a Steam-engine and Sugar Mill for my "Krean Estate, I beg leave to avail myself of your assistance in commissioning for the same; agreeably with the provision of our agreement in that respect.

"Will you therefore order for me by the present mail a Steam-engine and Sugar Mill, to be constructed by Messrs. Scott, Sinclair of Glasgow; of the same size, power, and description as the one they made for Mr. J. Donna-dieu's Valdor Estate by order of Mr. G. Stuart."

And towards the conclusion he says:—

"I am given to understand that the whole machinery with the Jimard "Batteries including freight and shipping charges up to its arrival in Penang "harbour, cost Mr. Donnadien £1,650, that he paid 10 per cent. of the cost "price as a deposit, and was to pay half the remainder in six, and the other "half in twelve months after delivery here. I state these particulars as a guide "in settling with Messrs. Scott, Sinclair for the price and its payment, and I "shall feel obliged by your instructing the deposit amount to be advanced "and paid, carrying the same to account of our agreement."

By a subsequent letter of the 7th March, 1846, addressed to the defendants, Mr. Rodyk directs that the Jimard Battery should be made after a model which Mr. Donnadien was to forward by that mail, and he adds:—

"With reference also to the mode of payment, Mr. Donnadien has since "informed me that after depositing 10 per cent. the balance is to be paid "half at 4 months, and the other half at 8 months, after delivery here; these "particulars may serve to prevent any misapprehension arising from what "I stated on the subject in my former letter."

In both these letters the mode of payment is particularly alluded to. One-tenth of the whole price was to be deposited immediately; and the balance to be paid by two equal payments in 6 and 12 months, according to the first, or in 4 and 8 months, according to the second letter; but it is not stated in either letter that bills were to be given.

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Mr. Brown in his evidence states that he enclosed copies of those two letters to Messrs. Hossack & Co., with instructions to them to order the machinery from the plaintiffs. Mr. Brown does not, however, produce any copy of the letter in which he gave those instructions to Messrs. Hossack & Co., and he swore that he had no copy.

It appears, however, from the evidence of Mr. Brown and of Mr. Rodyk, that, in the communication with Hossack & Co., the defendants assumed the character of principals; that in the accounts furnished by Messrs. Hossack & Co. to the defendants, the defendants are charged as principals; that those accounts were produced to Mr. Rodyk by the defendants to satisfy him that he was not liable to any other persons than to the defendants; that Mr. Rodyk has paid to the defendants the price of the machinery, with interest; and that the plaintiffs have not been paid either by Hossack or by the defendants.

I am therefore bound, in this case, to consider the defendants as principals, who instructed their general agents Messrs. Hossack & Co., to become their special agents in this instance for the purchase of this machinery, having a regard to the contents of the enclosed letters both as to the description of the machinery and mode of payment.

It does not appear when these instructions were forwarded to Hossack & Co., but it is sworn in the affidavit of James Gray Lawrie, which was read by consent, that the contract with the plaintiffs was entered into on the 8th of September, 1846, by James Hossack in person. The following is an extract from Lawrie's affidavit.

"That on or about the 8th day of September, one thousand eight hundred and forty six, I was present at an interview at Greenock aforesaid, between James Hossack of Liverpool, in the county of Lancaster, merchant, then carrying on business at Liverpool aforesaid under the firm of James Hossack and Company and the said Charles Cunningham Scott, one of the partners of the said firm of Scott, Sinclair & Co. At which meeting it was stated to the said Charles Cunningham Scott by the said James Hossack, on behalf of certain persons then carrying on business at Penang under the firm of Brown & Co., but whose individual names I am not acquainted with; that the said firm of Brown & Co., of Penang were desirous to have certain machinery manufactured by the said Scott, Sinclair & Co., and enquired as to the probable cost; and the said Charles Cunningham Scott gave to the said James Hossack the information which he required. That on or about the eighth day of September, one thousand eight hundred and forty six, a contract was made between the said Scott, Sinclair & Co., and the said James Hossack on behalf of the said firm of Brown & Co., for the manufacture and sale, and delivery to the said Brown & Co. at Penang aforesaid by the said firm of Scott, Sinclair & Co., of a high pressure Steam-engine with boiler, and one sugar mill with three boilers and one set of sugar pans for the sum of one thousand six hundred and twenty pounds. That such sum of one thousand six hundred

JEFFCOTT, R. "and twenty pounds was to be free of all commission and payable by three
1852. instalments, the first instalment of one hundred and sixty two pounds, to
— "be paid at the time of entering into such contract, and the other two instal-
SCOTT, "ments by equal bills at six and twelve months after the *delivery* of the
SINCLAIR & "aforesaid articles of machinery above specified and set forth at Penang,
Co. "such bills to be drawn by the said Brown & Co., on the said James Hossack
v. " & Co., and to be payable to the said Scott, Sinclair & Co."
BROWN & Co.

That appears to have been a verbal contract, for on the 9th of September, 1846, the following letter is written to Hossack & Co. by the plaintiffs.

"Greenock, 9th September, 1846.

"MESSRS. JAMES HOSSACK & Co.

"GENTLEMEN,

"In confirmation of your agreement yesterday, and in compliance
"with your wish we have now to state that we have undertaken to supply
"you with Sugar Mill Machinery as follows :—
"One Steam-engine with boiler. } Of the same dimensions as those sent
"One Sugar Mill with three rollers. } by us to Mr. Donnadieu for the sum
"One set of sugar pans. } of sixteen hundred and twenty
"pounds sterling, say £1,620, free of all commission and payable in three
"instalments, the first of £162 due at this date, and other two in equal bills
"at six and twelve months after the delivery of the machinery at Penang.

"The machinery to be delivered at the Quay here, on the 10th of December.

"Please acknowledge the receipt of this and oblige.

"Gentlemen,

"Your most obedient Servants,

(Sd.) "SCOTT, SINCLAIR & Co."

The receipt of that letter is acknowledged in a letter of the 15th September, 1846.

"Liverpool, 15th September, 1846.

"MESSRS. SCOTT, SINCLAIR & Co.

"GENTLEMEN,

"We are in receipt of your favours, dated the 9th and 10th instant;
"the first enumerating the conditions for the supply of machinery which are
"correct, with *two exceptions*, viz., free of all commission as added by you,
"which we presume means to recall your offer to us of 2½ per cent.; how-
"ever, to make that recall of any effect it should have been made during the
"interview at Greenock, and we of course consider ourselves fully and *clearly*
"entitled to it. The first instalment of £162, we now remit as per particu-
"lars at foot, the remaining sums in bills at six and twelve months (from the
"landing of the machinery at Penang). We presume you understand, as
"we do, that those should be by drafts drawn by us on Messrs. Brown &
"Co., at these dates and endorsed over to your goodselves.

"We observe that you have prolonged the date of delivery from the 7th
"to the 10th of December, but we do not suppose it will make any difference,
"and knowing as we do, the value of a lengthened time for the manufacture,
"to you, we shall endeavour and expect to be able to extend it, but in the
"meantime you will please understand that we cannot deviate from the con-
"tract in this respect. Should we be able to grant this additional time, you
"shall be made aware of it, at the earliest possible date.

"With respect to the new pans, will you have the goodness to inform us
"how long after the receipt of models, would we be required to make one

"set, that is the shortest possible time, and we shall be better able then to
"give instructions on that point.

JEFFCOTT, E.
1852.

"We are,

SCOTT,
SINCLAIR &
Co.

"Your most obedient Servants,

(Sd.) "JAMES HOSSACK & Co." BROWN & Co.

"Letters of credit in your favor on the Royal Bank, Glasgow, for £162
"enclosed herein."

In reply to this, by a subsequent letter of the 19th September, from the plaintiffs to Hossack & Co., [from which the following is an extract,] the mode of payment is fully explained.

"In reply to your favour of the 15th instant, we are sorry that we
"cannot allow you any commission on this order of machinery, &c.,
"and with respect to the payment, we do not attach any other meaning than
"that stated in our offer of the 9th instant, viz., that the machinery on being
"delivered at Penang, is then to be paid for by two equal bills, drawn by
"Messrs. Brown & Co., at six and twelve months from that date, in our
"favour, on Messrs. James Hossack & Co., &c."

To this letter, there is the following postscript:—

"The amount of the order on the Royal Bank for £162 is duly placed
"to your credit with thanks."

Those words "your credit" are relied upon by the defendants, as proof that the plaintiffs gave credit to Hossack & Co.; but, it appears from the letter that they did not give them *exclusive* credit.

By a letter bearing date the 23rd of September, 1846, written by James Hossack & Co. to the defendants, they are informed of the contract in the following words:

"We have now to advise that we have contracted with Messieurs Scott, Sinclair & Co. for steam engine, sugar mill, and one set of pans, similar to those furnished Mr. Donnadieu for one thousand six hundred and twenty pounds, to be ready for shipment by tenth December next, and we shall make arrangements for an opportunity to send them from the Clyde."

And it further appears that the receipt of such letter was acknowledged by the said Brown & Co., by a letter bearing date the 6th day of November, 1846, addressed to the said James Hossack & Co., of which the following is an extract.

"We are much pleased to learn that you have contracted with Messieurs Scott, Sinclair & Co. for Mr. Rodyk's machinery, with a set of pans, similar to those furnished to Mr. Donnadieu, for one thousand six hundred and twenty pounds, to be ready for shipment on the tenth of December next."

An addition of £90, is subsequently made by letters of the 7th and 13th of November, to the sum contracted for, in consequence of the alteration in the forms of the sugar pans. It is unnecessary to refer more particularly to those letters, as there is no dispute as to this additional sum. On the 28th of November, 1846, Messrs. Hossack & Co. wrote the following letter to the plaintiffs.

JEFFCOCK, R.
1853.

" Liverpool, 20th November, 1846.

" MESSRS. SCOTT, SINCLAIR & Co.

SCOTT,
SINCLAIR &
Co.

" GENTLEMEN,

" As we find that the *Stata* is to sail from Greenock next week,
" we beg to enclose a blank set of Bills of lading to be filled up for the engine
" and machinery, a copy of which please enclose under cover to Messrs. Brown
" & Co., Penang, and send us another. Be good enough to pass the entry at
" the Custom House; and furnish us with Invoice.

" The rate of freight is five shillings per ton, which the agents in Glas-
" gow for the vessel, state is the same as Messrs. Stuart & Co. pay.

" We are, Gentlemen,

" Your obedient Servants,

(Sd.) " JAMES HOSSACK & Co."

" Greenock."

The directions in this letter were literally complied with by the plaintiffs. They enclose two bills of lading, one to the defendants, the other to Hossack & Co., and they furnish but *one* Invoice, which is sent to Hossack & Co., as *directed*.

On the 8th December, 1846, the plaintiffs write to the defendants a letter, of which the following is a copy, enclosing a bill of lading.

" Greenock, 8th December, 1846.

" MESSRS. BROWN & Co.

" GENTLEMEN,

" We have now the pleasure to enclose you a bill of lading for
" machinery ordered by Mr. Hossack of Liverpool on your account. It has
" been all got safely on board the brig *Stata*, and we hope that the delivery
" will be made in good order, and that, when the mill is erected, it will give
" you satisfaction.

" The materials for *your* pans has not reached us from Staffordshire
" We will lose no time in their construction, when it does arrive.

" It will afford us pleasure at any future time to supply you with any
" description of machinery you may require. Trusting to have by and bye
" your approval of the present shipment.

" We are, Gentlemen,

" Your most obedient Servants,

(Sd.) " SCOTT, SINCLAIR & Co."

" Greenock, 8th December."

It appears that this was the only direct communication from the plaintiffs to the defendants, and that it took place, in consequence of the orders of Messrs. Hossack & Co.

The defendants in a letter from Penang, bearing date the 1st May, 1847, acknowledge the receipt of the last mentioned letter.

" Penang, 1st May, 1847.

" MESSRS. SCOTT, SINCLAIR & Co.,

Greenock.

" GENTLEMEN,

" We have the pleasure to acknowledge the receipt of your letter of
" 8th December, transmitting a bill of lading for machinery per *Stata*

"shipped to us by order of Messrs. James Hossack & Co. of Liverpool. The *Stata*, we are happy to inform you, has arrived, but is not yet ready to discharge the machinery, which, we shall report upon as soon as it is landed —meantime,

"We are, Gentlemen,

"Your most obedient Servants,

(Sd.) "BROWN & Co."

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On the 9th December, 1846, the plaintiffs enclose in a letter of that date, another bill of lading to Messrs. James Hossack & Co., as directed.

"Greenock, 9th December, 1846.

"MESSRS. JAMES HOSSACK & Co.

"GENTLEMEN,

"You have herewith the enclosed bill of lading for machinery shipped per Brig *Stata* for your friends at Penang, which, we hope may be delivered to them in good order by Captain Nicol.

"The plates are not yet forwarded for the Sugar-pans; but, we look for them daily, and you may be assured, we shall do all in our power to have them made thereafter, as expeditiously as possible.

"Mr. Lawrie being from home, it is out of our power to send Invoice at present with the shipment.

"We are, Gentlemen,

"Your obedient Servants,

(Sd.) "SCOTT, SINCLAIR & Co."

On the 14th January, 1847, the plaintiffs write to Messrs. Hossack & Co., a letter from which the following is an extract.

"GENTLEMEN,

"We prefix Invoice of cost of machinery shipped per Brig *Stata* for your friends at Penang, amounting to £1,490, &c., &c."

The Invoice is as follows :—

"Greenock Foundry.

"MESSRS. HOSSACK & Co.,

"To SCOTT, SINCLAIR & Co.

1846.		£	£
December.	To one high pressure Steam-engine with boiler, one Sugar-mill with three rollers, as per bill of lading ...	1,620	
	Less Sugar-pans not yet shipped, say...	140	
			1,480
	Packing boxes for ditto	10
			£1,490

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On the 19th of January, 1847, Messrs. Hossack & Co. furnish an account to the defendants, in which is the following charge.

"September 15th, 1846.—Paid Scott, Sinclair & Co. first instalment on "account of engine, &c., £162."

The defendants were informed by that account that a special contract had been made by the agent with the plaintiffs for a sum to be paid by instalments; the first of which had been paid, being one-tenth of the whole sum, in conformity with Mr. Rodyk's letter.

On the 21st May, the plaintiffs enclose, in a letter of that date to Messrs. Hossack & Co., the bill of lading for the pans shipped by the *Minerva*.

"Greenock, 21st May, 1847.

"MESSRS. JAMES HOSSACK & Co.

"GENTLEMEN,

"We now enclose the bills of lading for the Sugar-pans H. \$1 "C. 5, now on board the *Minerva* this day. The vessel we are advised will "go to sea to-morrow.

"We remain, Gentlemen,

"Your most obedient Servants,

(Sd.) "SCOTT, SINCLAIR & Co."

On the 27th, Messrs. Hossack & Co., write to the plaintiffs the following letter.

"Liverpool, 27th May, 1847.

"MESSRS. SCOTT, SINCLAIR & Co.

"DEAR SIRS,

"We have received your favour enclosing bill of lading per *Minerva*, "for the pans—please send us as early as convenient, and by return of post, if "possible, invoice of the whole; and inform us the respective amounts which "you have insured on each vessel.

"We are,

"Your very obedient Servants,

(Sd.) "JAMES HOSSACK & Co."

On this occasion, the plaintiffs receive no directions from Hossack & Co., to send either a bill of lading or invoice to defendants.

On the 2nd of June, 1847, the plaintiffs wrote the following letter, with invoice, to Messrs. Hossack & Co.

"Greenock, 2nd June, 1847.

"MESSRS. JAMES HOSSACK & Co.

"GENTLEMEN,

"We had the pleasure to receive your favor of the 27th instant, and "in accordance with your request, prefix invoice of the mill and pans, which "we trust you will find correct.

"We are, Gentlemen,

"Your most obedient Servants,

(Sd.) "SCOTT, SINCLAIR & Co."

The invoice is as follows :—

"Greenock Foundry.

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"MESSRS. JAMES HOSSACK & Co.,

"To SCOTT, SINCLAIR & Co.

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1846.		£	s.	d.
December ...	To goods as per account current furnished ...	1,490	0	0
1847.				
May 19th	One set of Sugar-pans { As per offers dated } complete as per mo- { 9th September, 7th } dels furnished ... { November, 1846 ... }	220	0	0
	Packing ditto	7	3	9
		1,717	3	9

On the 7th June, another invoice is sent :—

"Greenock Foundry.

"MESSRS. JAMES HOSSACK & Co.,

"To SCOTT, SINCLAIR & Co.,

1846.		£	s.	d.	£	s.	d.
Decr. ...	To amount of account current fur- nished for machinery ... ..	.....			1,480	0	0
1847.							
May	To one set Sugar { As per offers, dated } pans complete { 9th September and } as per model { 7th November, 1846. }	.....			230	0	0
	Packing boxes for engine, &c., Decem- ber, 1846	10	0	0			
	Packing for Sugar-pans	7	3	9	17	3	9
					1,727	3	9

Annexed to the following letter :—

"Greenock Foundry, 7th June, 1847.

"MESSRS JAMES HOSSACK & Co.

"GENTLEMEN,

"We beg to annex corrected invoice for engine, sugar pans, &c.,
shipped for Penang, the error having arisen by the writer from an overlook
of the £10, charged for packing boxes in our first invoice.

"We are, Gentlemen,

"Your obedient Servants,

"For SCOTT, SINCLAIR & Co.,

(Sd.) "R. C. McPherson."

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1852.

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On the 17th of June, 1847, Messrs. Hossack & Co. sent a general invoice to the defendants which according to Mr. Brown's evidence was the only invoice sent to the defendants before this action was commenced.

The following is the invoice.

"Invoice of Machinery for Alexander Rodyk, Esq., shipped per *Stata* and *Minerva* from Clyde for Penang, on account and risk of Messrs. "Brown & Co."

Per <i>Stata</i> .	£	s.	d.	£	s.	d.
One High Pressure Steam-engine with boiler	1,480	0	0	1,490	0	0
One Sugar-mill with three rollers as per Bill of Lading						
Packing boxes for ditto						
Per <i>Minerva</i> .						
One set of Sugar pans complete as per model furnished	220	0	0	227	3	9
Packing ditto	7	3	9			
Commission at 5 per cent.	.....			1,717 0 0		
				85 17 0		
				1,803 0 9		
				38 14 0		
Errors excepted	.....			1,841 14 9		

"Liverpool, 18th June, 1847.

(Sd.) "JAMES HOSSACK & Co."

"Insurances omitted £38.14.

"As per letter of 23rd July."

The receipt of that invoice and of the pans is acknowledged in a letter bearing date the 1st September, 1847, from Brown & Co. to J. Hossack & Co., from which the following is an extract.

"We have to acknowledge the receipt of your Invoice of Mr. Rodyk's "machinery for Krean Estate, a copy of which we shall send to him.

"[True extract.]

(Sd.) "BROWN & Co."

It thus appears that the delivery to the defendants of all the machinery was made on or before the month of September, 1847. The first set of bills would be due in the month of November, 1847.

On the 22nd of December, 1847, the plaintiffs wrote the following letter to Hossack & Co.

"Greenock, 22nd December, 1847.

"MESSRS. JAMES HOSSACK & Co.

"GENTLEMEN,

"The East India Mail having arrived, we fully expected to have received "a remittance, the first set of bills for the machinery shipped by the *Stata*.

"We shall thank you to advise us, if you have received any instructions from JEFFCOTT, B.
"your friends at Penang as to the payment. 1852.

"We are, Gentlemen,

"Your most obedient Servants,

(Sd.) "SCOTT, SINCLAIR & Co."

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On the 27th December, 1847, that letter is answered by BROWN & Co.
Hossack & Co., saying that they had received no remittance.

"Liverpool, 27th December, 1847.

"MESSRS. SCOTT, SINCLAIR & Co.

"GENTLEMEN,

"In reply to your favor of the 22nd instant, we beg to state that we
"have not received any instructions from our friends at Penang, respecting
"the remittance for your machinery, but we trust that by next mail, we may
"receive some advices in this transaction,—meantime,

"We are, Gentlemen,

"Your most obedient Servants,

(Sd.) "JAMES HOSSACK & Co."

On the 28th December, 1847, the plaintiffs wrote to Hossack
& Co., the following letter.

"Greenock, 28th December, 1847.

"MESSRS. JAMES HOSSACK & Co.

"GENTLEMEN,

"We wrote you on the 22nd instant, regarding remittance for the ma-
"chinery shipped per *Stata*, to which we crave reference. We stand much
"in need of the cash at present, and will thank you for an early reply with
"the remittance.

"We are, Sirs,

"Your most obedient Servants,

(Sd.) "SCOTT, SINCLAIR & Co."

On the 3rd February, 1848, they wrote again to Hossack
& Co.

"Greenock, 3rd February, 1848.

"MESSRS. JAMES HOSSACK & Co.

"GENTLEMEN,

"Another India Mail has arrived, and we have not received any remit-
"tance for the machinery shipped per *Stata* for your friends at Penang.
"We are most anxious in consequence, as Messrs. Stuart & Co. made a
"remittance in November for their shipment by the same vessel, being at
"the regular time by our agreement.

"We remain, Gentlemen,

"Your most obedient Servants,

(Sd.) "SCOTT, SINCLAIR & Co."

On the 5th of April, 1848, they wrote again :—

"Greenock, 5th April, 1848.

"MESSRS. JAMES HOSSACK & Co.

"GENTLEMEN,

"We are very much disappointed at not having received a remittance from
"your Penang friends for the machinery shipped per *Stata*. We ought, by
"the bargain entered into with you, to have been in possession of the first

JEFFCOOT, R. "set of bills on the 22nd December. It is now upwards of three months,
1852. "since that period, and we are most anxious, in consequence of this great
"irregularity. Have you had any communication on the subject?"

SCOTT,
SINCLAIR &
Co.

"We are, Gentlemen,

"Your most obedient Servants,

(Sd.) "SCOTT, SINCLAIR & Co."

BROWN & Co.

On the 24th April, they wrote again:—

"Greenock, 24th April, 1848.

"MESSRS. JAMES HOSSACK & Co.

"GENTLEMEN,

"We wrote to you on the 5th instant, to which we beg to refer, and as
"we did not receive an answer to that letter, we now request that you will
"do so by return of post, as it will be necessary for us to write to Penang
"by this mail.

"We are, Gentlemen,

"Your most obedient Servants,

(Sd.) "SCOTT, SINCLAIR & Co."

"P.S.—By the mail just arrived, we have received remittance in full
"from Stuart & Co., for machinery shipped per *Stata*."

But on the 18th of April, 1848, Hossack & Co., had suspended payment, of which they gave the plaintiffs notice. On the 25th May, 1848, the plaintiffs write to their Agent, Mr. Herriot, to apply to the defendants for payment.

It would appear that the first application on the 22nd of December, 1847, had been communicated by Messrs. Hossack & Co. to the defendants, for in a letter bearing date the 31st March, 1848, addressed by the defendants to Messrs. Hossack & Co., they state "with these alternation and valuing against our shipments at the
"rate of 80 per cent. as agreed upon, you will perceive by the
"enclosed sketch that we have more than sufficient funds in your
"hands to meet the payment of Mr. Rodyk's machinery."

The defendants admit that the machinery was delivered to them, that the price is fair, that they have been paid by Rodyk, that they are liable as principals to Hossack & Co., for the full price of the machinery, but they deny their liability to the plaintiffs on several grounds.

They have referred me to 3 cases collected in 2 Smith's Leading Cases, 198.—*Paterson v. Gaudesequi*, *Addison v. Gaudesequi*, and *Thompson v. Davenport*.

In *Paterson v. Gaudesequi* the sole question was whether it was sufficiently proved at the trial that the plaintiffs knew at the time of the sale that the defendants were the principals, and a new trial was granted to ascertain that fact, as it could not be held that the plaintiffs had elected to give exclusive credit to the agents unless they knew who the principals were.

In the case of *Thompson v. Davenport* the plaintiffs, knowing that the purchaser McKine was merely an agent, but not knowing who his principals were, although at the time they debited McKine in their books, and the Invoices were made out in his name only, were held not to have elected to give exclusive credit

to the agents, because at the time they did not know who the principals were.

Those two cases differ in their circumstances from the present.

In the case of *Addison v. Gaudesequi*, the plaintiffs, knew that Larrazable & Co., were purchasing as agents and that the defendants were the principals, and it was held upon the evidence that the plaintiff had elected to give exclusive credit to the agents, but in that case the evidence was very conclusive. The house of the agents had previous dealings for 20 years with the plaintiffs. The Invoices were all made out by the plaintiffs in the names of the agents. The agents were debited in the plaintiff's books, one of the partners in the agent's house [which had become bankrupt] being examined, stated that the house had purchased those goods of the plaintiffs on their own credit and account, as they would any other goods and that they had insured the goods in their own names.

Upon that evidence and in the absence of any special agreement, or of any evidence to the contrary, the plaintiffs were held to have made their selection to give exclusive credit to the agents.

In the present case the question is whether, upon the evidence now before the Court, it should hold that the plaintiffs had elected to give exclusive credit to Hossack & Co., or whether, upon any other ground, the defendants are relieved from liability to the plaintiffs.

The defendants urge that they were not parties to the contract, and that in the correspondence between plaintiffs and Hossack & Co., they are not treated as such. It is true that in the letter of 9th of September the defendants are not named. But the words with which that letter commences are "In confirmation of our agreement yesterday, and in compliance with your wish we have to state, &c."

The agreement of the 8th of September, "in confirmation of which" that letter was written, is fully stated in the evidence of J. G. Lawrie, and it appears from his evidence that the names of the defendants were disclosed by their agent Hossack at the time of that original agreement, and that the plaintiffs insisted not only that the defendants should give them bills, but that Hossack & Co. should join in the bills to guarantee their payment by defendants, although the names of the parties to the bills are not mentioned in that letter.

It appears from the letter of the 15th September from Hossack & Co., to the plaintiffs, acknowledging the receipt of the letter of the 9th, that Hossack & Co. understood that the bills mentioned in the letter of the 9th were to be drawn by Hossack & Co. upon Brown & Co. for the 2nd and 3rd instalments, but as the names of Brown & Co. do not occur in the letter of the 9th, it is quite clear that the understanding of Hossack arose from what occurred at the interview at Greenock on the 8th of September, on which occasion the defendants' names were mentioned and the parol agreement made.

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1852.

SCOTT,
SINCLAIR &
Co.

v.

BROWN & Co.

It is established that parol evidence is admissible to shew that a person who has made a written contract as principal is in reality but an agent, when the object of the evidence is to charge the principal, 2 Smith's leading Cases, 225,—but even without the parol evidence, the letters of the 9th and 15th are to be taken together as expressing the terms of the contract according to the understanding of defendants' agents. Hossack & Co. remitted the full instalment in that letter of the 15th September upon their understanding of the contract, and upon the 19th January, 1847, an account is sent to the defendants charging them with the first instalment, which instalment was shortly after paid by the defendants to Hossack & Co.

In a letter of the 19th September, the plaintiffs state that their understanding of the agreement was that Hossack & Co. should be the acceptors, and Brown & Co. the drawers and indorsers.

It thus appears distinctly that the plaintiffs did not elect to give exclusive credit to Hossack & Co., but that they always insisted that Brown & Co. should be parties to the bills.

This action is not brought to enforce a delivery of the bills in performance of the special contract. The time for the performance of that special contract expired 5 years ago, and the evidence just alluded to is used to shew that the plaintiffs did not, at the time of the sale, by the terms of their original agreement, elect to give exclusive credit to the agents.

The defendants then urge that as the terms of the contract were never communicated to them, they were led to believe that the credit had been given exclusively to the British agent according to the usage of trade in the case of foreign merchants.

In the absence of any special agreement, the presumption in the case of foreign merchants is, that exclusive credit is given to the British agent, but, as Mr. Justice Story says, "that presumption is liable to be rebutted either by proofs that credit was given to both principal and agent, or to the principal only." Story's *Law of Agency*, 230. In this case it has been proved that by the contract the credit was given to the principal and agent, and it was not the duty of the seller to communicate to the defendants the terms of the contract. This was the duty of their own agents, and if through their neglect of their duty, the defendants were acting under a wrong impression, the defendants should suffer for the misconduct of their own agents, and not the plaintiffs. The defendants then urge that the three invoices, made out in the name of Hossack & Co., only, shew that the plaintiffs elected to give exclusive credit to them. If there had been no other evidence of the contract, than what appears on the face of the invoices, it might be inferred from them that exclusive credit had been given to Hossack & Co., but in this case Hossack & Co., to whom the invoices were sent, knew that they were not the only evidence of the contract, for they knew that there was a special agreement. They were the persons who had made that agreement, and they had in their possession the written correspondence canvass-

ing its terms, and two of the invoices have marginal notes referring to the letters containing the contract. It would therefore be absurd to hold that Hossack & Co., who had directed the invoices to be sent to themselves, had been deceived by the mere heading of those invoices, into a belief that exclusive credit had been given to them. Their answers to the plaintiffs' subsequent letters shew that they had no such belief.

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It may be urged that as the plaintiffs, by furnishing such invoices, gave their agents the means of misleading the defendants, the defendants should be discharged from liability to the plaintiffs, but it appears in evidence that these invoices were not sent to the defendants by Hossack & Co., until after the commencement of this action, and, therefore, that the defendants had not been misled by them.

The defendants next urge that the Court should presume that Hossack & Co. are debited in the plaintiffs' books from the heading of the invoices, but such a presumption cannot be made, for in this case the defendants should have proved the entries in those books as part of their proofs, for it lies on them to shew that they are exonerated; and as plaintiffs attempted to prove those entries, but the proof was rejected on an objection by the defendants, I can only say that it has not been proved to whom the credit is given in the plaintiffs' books.

The defendants then urge that the plaintiffs should have insisted on a delivery of the bills and should not have waited till the expiration of the credit. I do not see that the plaintiffs were under any necessity to insist on bills, and they might have had some difficulty in doing so unless they consented to take Hossack & Co. as drawers, as Hossack & Co. do not appear to have expressly stated that they would become acceptors, although the plaintiffs appear to have acted on that understanding. The first set of bills may be taken to be due some time after the 1st November, 1847, for in the letter of the 1st of May it is expressly stated that the goods had not been then landed, and that a further letter should be sent to report upon them when landed, which letter does not appear to have been sent. On the 22nd of December, the first set of bills were demanded, which may or may not have been quite a month after they were due.

I do not think the letter of the 28th of December can be considered as waiving the bills, and looking solely to Hossack & Co., nor do I think that the words "bargain with you" in the letter of the 5th April have the meaning the defendants put upon them.

The defendants then urge that the agents having exceeded the authority given by their special instructions, in pledging the defendants to give bills, the defendants are not bound by any part of the contract. I should hesitate to decide that the agents exceeded their instructions by undertaking [*not* that the agents should accept or endorse bills in the names of the defendants] but that the defendants, having asked a credit of 6 and 12 months for so large a sum as £1,620, should send their own bills after the machinery had been delivered to them. But supposing the agent had exceeded his authority in engaging that the defendants

JEFFCOOT, R. should send their own bills, still as the instructions were followed exactly in all other respects the execution of the authority is good and the excess void,—*Story's Agency*, 136,—for the Court cannot see that any disadvantage has accrued to the defendants by getting the 6 and 12 months' credit without being called upon to give bills. The Court considers this contract as if made with the defendants and if they had contracted to give bills, and afterwards did not give them, the plaintiffs could wait till the expiration of the credit, and then sue them.

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It does not appear that plaintiffs by any agreement, either express or implied, with Hossack & Co., waived their right to get the bills, and therefore the case of *Thornton v. Meux, M. & Mal.*, 43, does not apply; but the plaintiffs did not take proceedings to enforce the delivery of the bills, as they would have had some difficulty in doing so, and the credit was so short that it was likely to expire before the delivery could be enforced.

I do not think the case of *Kymer v. Suwercrop*, I. Camp. 109, or that class of cases, applies, as in those cases exclusive credit is given to the agent in the first instance, believing him to be the principal, but afterwards a principal is discovered. If, in such case, a seller delay an unreasonable time after the discovery of the principal, before he applies to him for payment, and if, during that time, the principal, in the ordinary course of business, pay the agent, and the principal be afterwards sued, it must be subject to the state of the accounts between him and the agents, as the seller by his own acts and conduct had given the principal good ground for presuming that the seller never intended to apply to him for payment.

I think that the plaintiffs have done nothing in this case to prejudice their right to recover from the defendants. If the defendants have been kept in ignorance of the terms of the contract made for them, their agent is to blame. They obtained all the terms stipulated for in Mr. Rodyk's letter. The goods were in part forwarded to them on the 8th December, 1846, accompanied by a letter stating that they had been ordered on their account, and they accept the delivery. On the 19th January an account is furnished charging the defendants with the first instalment, which they pay on the 18th June. They are furnished with a general invoice from their agents in the heading of which it is stated that the goods were shipped on their account and at their risk and their agents charge them with commission for their agency.

The defendants allege that they have settled in account with Hossack & Co. for the price of this machinery, but it is admitted that Hossack & Co. have not paid the plaintiffs.

The Court is of opinion that the defendants are liable to the plaintiffs for the full balance claimed, as the plaintiffs do not appear to have done any act releasing the defendants from their original responsibility as principals.

Verdict for plaintiffs, Spanish Dollars 7,512.95 with interest from 5th August, 1848, at 5 per cent. *per annum*, with costs.

JOHN COLSON SMITH *v.* BEHN, MEYER & CO.

In order to prevent a payment or gift made by an Insolvent on the eve of Bankruptcy, and within two months of his adjudication, voluntary,—it is not sufficient to shew merely pressure or importunity on the part of the creditor, but also that such pressure or importunity operated on the mind of the insolvent and led to the payment or gift being made.

The fair conclusion to be drawn from all the cases on the subject, appears to be, that in a simple transaction, free from all suspicious circumstances, payment made by an insolvent within two months of his Bankruptcy, in the usual course of business, and in consequence of a *bona fide* demand, is not a voluntary payment: but where the case is a mixed case in which, though there was pressure on the part of the creditor, there was a desire on the part of the debtor by such payment to accomplish an object of his own, which the creditor was not at the time aware of,—but to accomplish which object, the debtor seizes on the creditor's importunity as a favourable opportunity to carry out his object,—such payment will be deemed voluntary; and the money or goods paid or given under such circumstances is recoverable by the Assignee from the creditor so preferred.

SINGAPORE.

JEFFCOTT, R.
1854.

April 12.

Motion for a new trial. The facts and points sufficiently appear in the judgment.

R. C. Woods, sen. shewed cause.

Napier supported the Rule.

Cur. Adv. Vult.

On this day judgment was delivered by

Jeffcott, R. In this case the action was brought by the official Assignee of the Estate of Wolcott & Co., to recover a sum of Spanish Dollars 2,877 and 48 cents paid to the defendants by W. Dreyer, one of the partners of that Company, immediately before their petition was filed in the Insolvent Court. The case was tried in November last when a verdict was found for the plaintiff for the sum claimed.

A Rule *Nisi* has been obtained by the defendants to set aside that verdict as against evidence. The following are the circumstances of the case as proved at the trial:—

In the beginning of the month of August, about six weeks before the 23rd September, 1852, the defendants had purchased from Wolcott & Co., two Bills of Exchange, each being for \$2,000, drawn by Wolcott & Co., on Schweman & Co., of Canton.

On the 22nd of September, 1852, defendants purchased a third bill for \$2,877 and 48 cents drawn by the same Wolcott & Co., on the same Schweman & Co., payable 30 days after sight. On the 23rd of September, 1852, the mail steamer arrived in Singapore from China bringing Mr. Overwig, an Agent of the said Schweman & Co. of Canton, who about 1 o'clock p.m. on that day had an interview with the insolvent, Dreyer, and informed him that the house of Wolcott, Bates & Co. of Shanghai with which the firm of Wolcott & Co. had extensive dealings, had failed.

Just before he gave that information, the mail bag had been brought into Mr. Dreyer's office, and in it was a letter from the agent of the Shanghai house giving an authentic account of the failure. Shortly after and while Mr. Overwig was still in the office, the defendant Schrieber, one of the partners in Behn, Meyer & Co., entered, having in his hand the protest for non-acceptance of the two bills on Schweman & Co. for \$2,000 each,

JEFFCOTT, R. which Dreyer had sold to him 6 weeks before, and Dreyer gave the following evidence as to what passed between him and Schrieber: "He told me as those two bills had been protested 1854.
SMITH
v.
BEHN,
MEYER & Co. "that he could not remit the same kind of paper again to his friends "at Canton and he requested me to pay him back the money "which he had paid to me on the previous day for the bill on "Schweman & Co.—the bill for \$2,877.48 cents. Upon that I "gave him a cheque on the Bank for the amount, and either he "or I tore up the bill. That was all that was said on the occasion, and the whole time that Mr. Schrieber remained in the "office did not exceed 5 minutes. At the time I gave the cheque "I was in great confusion of mind as I believed that our house "would be largely involved by the failure of Wolcott, Bates & Co., "that we should lose largely by it, but I could not tell to what "amount as I did not then know the state of the accounts. I knew "that the firm was in difficulties when I saw Schrieber, but it did "not occur to me that we were insolvent or that we should file a "petition in the Insolvent Court. At that time the thought of "insolvency had not occurred to me. Immediately after I had "given the cheque to the defendant, it struck me I had done "wrong. I made the payment to him to save the expense of re- "change and the other expenses of transmitting the bill. I also "made the payment to him because I had drawn those bills "against a consignment of goods then in the harbour which we "intended to consign to Schweman & Co., but as he had refused "to accept the former bills I was glad to get back the bill from "Schrieber as I would not be obliged to make the consignment. "The consignment amounted to dollars 11,500,—of that about "dollars 2,000 worth was paid for. I also made the payment to "Schrieber that I might get him out of the office as soon as possible that I might have time to examine into my affairs. On the "morning of the 23rd September, I had given to the Bank bills "on Schweman & Co. for dollars 7,500, which, with the amount "of Schrieber's cheque for the purchase money of the bill for dollars 2,877.48 cents, and a small balance to our credit of "about dollars 300, made up about dollars 11,000 then in the "Bank to the credit of our Firm, but at the time I gave "the cheque to Schrieber I believe we had in the Bank only "the small balance of dollars 300, which could properly speaking be said to belong to our firm. After Schrieber had left "the office and after I had time to collect any thoughts the impression on my mind was that we could not pay our creditors in "full." Mr. Dreyer further proved that the Insolvents had purchased a few days before, from Rahman Chitty, betelnut to the amount of about \$3,000 for cash,—that the last delivery was on the 20th September, and that about three hours after Schrieber had called, Rahman Chitty called and demanded payment which the insolvent Dreyer refused as he had then made up his mind that they should call a meeting of their creditors.

He further proved that on the same day after Schrieber had left the office, other parties had returned to them protested bills to the amount of \$6,597.37 cents, and that the only two houses

in China upon which the insolvents drew were Schweman & Co., and Walcot, Bates & Co., one of which had failed and the other had refused to accept their bills. Between 6 and 7 o'clock that same evening, the insolvents on consulting together, determined to call a meeting of their creditors, and accordingly on the next day [the 24th September] the insolvents, having first consulted at 6 A.M., with their Law Agent, Mr. Woods, issued notices calling a meeting of their creditors, which was held about 10 or 11 A.M. of the same day, when a balance sheet was called for, and the meeting having named trustees, adjourned to the following day. On the following day, the 25th September, the insolvents submitted to their creditors a rough sketch of their affairs shewing a balance against the insolvents. And on the 27th September, the insolvents by the direction of their creditors filed their petition in the Insolvent Court.

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Under those circumstances, the cheque was given by Dreyer to the defendant Schrieber and to recover the amount paid to the defendants on that cheque, the official assignee of the insolvents brought this action under the 24th sec. of VI. Vict., c. 21. [The Indian Insolvent Act.]

The following are the words of that section:—

“And be it enacted that, if any Insolvent who shall file his petition for his discharge under this act, or who shall be adjudged to have committed an act of Insolvency, shall voluntarily convey, assign, transfer, charge, deliver or make over any estate real, or personal, security for money, bond, bill, note, money, property, goods or effects whatsoever, to any creditor, or to any other person in trust for or to, or for the use, benefit and advantage of any creditor, every such conveyance, assignment, transfer, charge, delivery and making over, if made when in Insolvent circumstances, and within two months before the date of the petition of such Insolvent, or of the petition on which an adjudication of Insolvency may have proceeded, as the case may be, or if made with the view or intention by the party so conveying, assigning, transferring, charging, delivering or making over, of petitioning the said Court for his discharge from custody under this Act, or of committing an act of Insolvency, shall be deemed and is hereby declared to be fraudulent and void as against the assignees of such insolvent.”

Before the plaintiff can recover in this action he must prove—first, that the payment was made “voluntarily,”—second, that it was made to a creditor,—third, that at the time it was made, the firm was “in insolvent circumstances,”—fourth, that it was made within two months before the date of the insolvent’s petition, or with a view of petitioning the Insolvent Court, or of committing an act of Insolvency. And it is the duty of the Court to decide upon the evidence, whether those matters have been proved to the satisfaction of the Court. The diligence “of the Law Agents” has supplied me with every important case relating to the subject. Many of those were cases under the Bankruptcy Act.

To avoid payments made under those Acts, it is necessary to

JEFFCOTT, R. prove two things,—first, that the payments were “voluntary,”—
 . 1854. second, that they were made with a view of giving a fraudulent
 — preference in contemplation of bankruptcy. Under the 24th sec.
 SMITH of the Indian Insolvent Act, it is only necessary to prove that the
 v. payment was “voluntary,” if made by an Insolvent to his creditor
 BEHN, within two months before the date of his petition. *Becke v.*
 MEYER & Co. *Smith*, 2 Mees & W. 191. It is therefore unnecessary for me
 to refer to those cases under the Bankrupt Acts in which it was
 admitted that the payment was voluntary, and the argument was
 confined to the question, whether it was made with a view to a
 fraudulent preference. In the present case, it is not disputed,—
 first, that the payment was made to a creditor,—second, that
 at the time it was made the firm was in insolvent circumstances,—
 third, that it was made within two months before the date of
 their petition. The only question, therefore, which remains to be
 determined by the Court is,—fourth, whether the payment was
voluntary.

The following are the cases which assist most towards forming
 an opinion on that question. In 2 Bos. and P. 582 “*Hartshorn v.*
Slodden, at the desire of the defendant, goods were delivered to
 her by the bankrupt as a security for his debt. Lord Alvanby,
 C. J. in his judgment, says, “If the goods be delivered *through*
 “*the urgency of the demand or the fear of prosecution*, whatever
 “may have been in the contemplation of the bankrupt, this will
 “not vitiate the proceeding.” Or in other words such a delivery
 could not be held to be “voluntary.”

In 7 East 544, *Thornton v. Hargreaves*, the jury having found
 that the payment was *not voluntary*, on motion for a new trial the
 case from Bos. and P. is cited in argument, and is the only case
 to which the Court is referred, and Lord Ellenboro’ in his judg-
 ment, says—“The only difficulty which lies on the plaintiffs in
 “this case is to make out that this was a ‘voluntary’ payment,
 “taking the conversation reported between the defendants and
 “the bankrupt, to be a *threat of process* if they did not receive
 “payment or security for their demand, I do not see how the
 “the execution of such a threat could put the bankrupt in a worse
 “situation than the actual transfer of the goods did, for that left
 “him without any property, and he was immediately obliged to
 “break up his business and leave his home. This would rather
 “shew that he did not make the transfer by *dint of the threat*,
 “for he did not redeem himself from any present difficulty by doing
 “the act which is the motive for such an act when really done
 “*under the pressure of a threat*, and if he got nothing by evading
 “the threat, I should rather say that, it was a voluntary act and
 “preference on his part as to the particular creditor.” The jury
 having found that it was not voluntary a new trial was granted.

In 11 East 256, *Crosby v. Crouch*, Lord Ellenboro’, C. J., says,
 “In considering whether the act in question was in this sense
 “‘voluntary,’ it is material to see from which party the
 “proposition for making the deposit originated, whether from
 “the bankrupt or the defendant,—it certainly proceeded wholly
 “from the defendant—he is stated to *have required* the act to be

"done. It is therefore on any fair interpretation of the words, not referable to any supposition of favor and preference exercised on the part of the bankrupt, but to *urgency* and *importunity* on the part of the person obtaining the deposit." Again he says: "There was no doubt, at the trial, of the fact of urging for the security; such fact appearing upon the face of the defendant's deposition read in evidence by the plaintiff, &c." The plaintiff had been non-suited, the rule to set aside the non-suit was discharged.

JEFFCOOT, R.
1854.
SMITH,
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BEHN,
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In 7 Bingh : 438, *Cook v. Rogers*. The bankrupt had given a bill for £600 to the defendant payable on 29th September. On the evening of the 18th September, the defendant who had before threatened to arrest him if the £600 bill was not paid when due, again threatened to arrest both him and his father. The money not being paid, the defendant again came on the morning of the 19th and said he would be fooled no longer, and his bill was paid. This payment, however, did not relieve the bankrupt from his difficulty or render it the more probable that he could continue his business. On the evening of the 19th September, he committed an Act of Bankruptcy. Being called as a witness on the trial, he stated that he paid the money to secure his father, and at the same time to benefit the defendant; that he had no recollection of any threat, and if any such had been used, it would have had no effect on him, that he was not exactly acquainted with the state of his accounts and did not then contemplate bankruptcy, but, perhaps, a composition with his creditors,—afterwards, however, on that day he was advised to become bankrupt. Tindal, C. J., told the jury to "consider whether Baker contemplated bankruptcy, and secondly, whether the payment was made voluntary" or in consequence of any threat from the defendant, and with a view to assist them in the consideration of those questions, he directed them to consider what was *passing in the bankrupt's mind* at the time of the payment and the motives by which he probably was actuated. The jury found the payment "voluntary," and on the motion for a new trial on the ground of mis-direction, Tindal, C. J. says:—

"This is not a case of simple preference, nor the equally simple case of a payment obtained by threats, without any sinister intention on the part of the debtor. *It is a mixed case in which the debtor had an object in favoring the particular creditor, but in which the creditor also, before he knew of such a disposition on the part of the debtor had urged and importuned him for payment.* It has been argued for the defendant that wherever threat or importunity has been resorted to, there cannot be voluntary payment; but that proposition is too constrained, and it must be left to the jury to say, whether the threat had any operation or not. If when a threat has been employed, no other circumstance is to be inquired into, how came Lord Ellenboro' in that case [*Thornton v. Hargreaves*] to look into all the accompanying facts on the motion for a new trial." His Lordship then cites Lord Ellenboro's judgment as given above, and adds: "That is conclusive to shew the Court did not consider the threat a

JEFFCOTT, R. 1854. "sufficient reason for shutting out the consideration of other circumstances. The jury have found the payment was made voluntarily, and I see no reason for disturbing their verdict."

SMITH v. BEHN, MEYER & Co. Alderson, J., reconciles the cases of *Hartshorn v. Slodden*, *Crosby v. Crouch*, and *Thornton v. Hargreaves*, and adds: "Threats on the part of the creditor are a *strong circumstance* to shew that the payment ensuing is not voluntary, but, if as here, the party be not placed in a better situation by yielding to the threats, or if he disclosed such a reason for preference, that the threats could obviously have produced no effect upon his mind, those are circumstances which afford a strong inference the other way." The rule for a new trial was discharged.

In 5 B. and Ad. 289, *Morgan v. Brundrett*, the following words from the judgment of Mr. Justice Patterson have been much relied upon by the defendant "upon the question of pressure, in order to shew that the deposit was made *voluntarily*, I think, it ought to have appeared clearly that the bankrupt took the first step towards making the deposit." It was unnecessary for him to *decide* to that extent, as the same learned Judge in the words which immediately follow, states: "that there was evidence that [the bankrupt] has been frequently asked for payment or security," and Littledale, J., in the same case says, "I think here was strong evidence to show that the deposit was made in *consequence of pressure*, for it appeared that the defendant had frequently or urgently asked for the money or security, and that a bill had been filed against the bankrupt on which he was liable to be taken on attachment."

The expressions of Patterson J. upon which the defendant relies are therefore clearly but mere general observations and not a decision upon the facts of the case, and it is quite clear according to the cases in 7 East 544, and 7 Bing 438, already cited, that although the bankrupt did not take the first step, and although the defendants used threats and importunity, the payment may be "*voluntary*" if not made in *consequence* of the threats and importunity but under the influence of other motives. In *Rigg v. Baker*, 3 Mees. & W. 197, it was proved that before the 12th July, the bankrupt had expressed his desire to give the defendant security, and that he gave it [in the language of the witness] "quite spontaneously," the defendant having made no application to him to execute the bill of sale until that day. The jury found a verdict for the plaintiff thereby finding that the execution of the bill of sale was "*voluntary*." On a motion for a new trial, Parke B. says: "The giving the bill of sale itself was undoubtedly altogether the spontaneous act of the insolvent." A second trial of the same case, before the same Judge, Parke B., is reported in 4 Mees. & W. 348. At the trial, the examination of the defendant was read, in which the defendant stated that the bankrupt "offered him security spontaneously." Parke B. in his charge told the jury that *pressure* of the creditor was not necessary, but that if it originated with the insolvent, it could only have been made by way of "*voluntary preference*." The jury found "it was *not voluntary*"—Lord

Abinger C. B. says—"I am of opinion that the verdict was right and the direction right. There is a fact in the case which seems to have escaped Mr. Crowder's attention, which is, that the bankrupt said he executed the bill of sale *because he apprehended* if he did not, Baker would put in a distress. I do not, however, think this was necessary and I should be sorry to have it understood I thought it essential. I think if a demand is made by a creditor *bona fide* and a transfer takes place in pursuance of that demand, that takes it out of the case of 'voluntary' transfer, contemplated by the Insolvent Act." The rule for a new trial was refused.

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It appears to have been clearly proved in that case that the offer of security originated with the bankrupt, but that when asked by the defendant on the 12th July to execute the bill of sale, he executed it "because he apprehended if he did not, that the defendant would put in a distress." In that case the demand by the defendant conveyed to the bankrupt's mind a threat of distress if he should refuse to execute, and influenced by the demand so made, he executed the bill of sale. The jury were therefore fully justified in finding that the bankrupt did not execute "voluntarily" and the decision of the Court that on the facts proved, the verdict was right, cannot be found fault with.

The opinion expressed by Lord Abinger, although not a decision on the case before him, appears to have been adopted in subsequent cases. The cases of *Knight v. Fergusson*, 5 M. & W. 389, and *Arnell v. Bean*, 8 Bing 87, have little application to the case under consideration, as in those cases the Court held that the deed was executed for "a new and valuable consideration paid by the defendant, and in such cases a deed is never held to be voluntary."

In *Jackson v. Thompson*, 2 Ad. & E. [N. S.,] 89, the facts of which are also reported in 3 M. & Gr. 621, the Insolvent was examined at the trial, and stated that he had called a meeting of his creditors, and at that meeting the assignment was proposed by a creditor—"at that meeting I stated my affairs to the creditors. They required me to make the assignment. I made the assignment on account of the wish of the principal creditors. It was *not voluntary* on my part." The Agent of the Insolvent who gave the instruction to the attorney for preparing the deed, was also examined, and said: "I think I proposed the assignment on behalf of the Insolvent. The creditors were urgent for something to be done. The assignment was proposed for that reason." The jury found the assignment was voluntary, and on a motion for new trial, the Court refused to grant the rule.

In that case the Court appears to have determined from a consideration of all the circumstances of the case, the Insolvent having called the meeting of the creditors at which the assignment was proposed and his agent having given the instructions to his attorney to prepare the deed, that the Insolvent was the moving party, and that the assignment was "voluntary" although the Insolvent swore that it was "*not voluntary*."

JEFFCOTT, R.
1854.
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In *Cook v. Pritchard*, 5 Man & Gr. 329, Tindal C. J. told the jury notwithstanding there had been pressure and importunity on the part of the defendant the question they had to consider was whether the payments were made *in consequence of that pressure or importunity* or were "*voluntary*." The jury found the payments were "*voluntary*" and on a motion for a new trial on the ground of misdirection,—the objection to the charge was that the Chief Justice had assumed that the pressure was necessary to prevent a payment being voluntary. Maule J. says: "His Lordship seems to have assumed that importunity and pressure had been proved, and, assuming that as a fact in the case, to have thought that the plaintiffs would still be entitled to recover, provided the jury came to the conclusion that the payments were made, not in consequence of the *importunity* and *pressure* but in order to give a preference to the defendant."

Creswell J. says: "If the Lord Chief Justice had told the jury that the facts proved did not amount to importunity and pressure, I should have thought the case required reconsideration. I do not see any fault to be found with the summing up." The rule for a new trial was refused.

In that case, on the authority of *Rigg v. Baker*, and the other cases cited, the Court appeared inclined to hold that a payment would not be voluntary if made in consequence of a *bonâ fide* demand although no pressure or importunity had been used, and to have decided that although importunity and pressure had been used the payment may be voluntary if not made in consequence of that pressure and importunity. The fair conclusion from all the cases appears to be that in a simple transaction free from all suspicious circumstances, payment made by an Insolvent within two months before the date of his petition in the usual course of business and in consequence of a *bonâ fide* demand will not be held to be voluntary.

In the case now under consideration, the question the Court will have to decide is whether the payment was made in consequence of the request of Schrieber, supposing a request equivalent to a demand, or whether it was made by the Insolvent not in consequence of the request, but voluntarily and with a view to accomplishing objects of his own. To enable the Court to decide that question, it is bound to consider what was passing in the Insolvent's mind at the time, which may be collected not only from his statements but from all the facts of the case.

1st.—It is clear that the Insolvent could if he chose, have refused to make the payment, as the bill was payable 30 days after sight and had not been presented for acceptance. It was not a payment made in the usual course of business.

2nd.—The Insolvents gained no advantage by the payment, it did not relieve them from their embarrassments or better their position.

3rd.—A few hours after the payment to the defendants, payment was refused to other creditors.

4th.—The Insolvent, although pressed to state all that was passing in his mind at the time of payment, does not state that

he was influenced by the request of Schrieber or by anything he had to expect or fear from him. JEFFCOTT, R.
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5th.—He states the reasons which in the very confused state of his mind made him glad to make the payment, which reasons relate to the general state of his affairs, and to his own personal convenience and not to anything he had to expect or fear from Schrieber. SMITH
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6th.—Immediately after he had given the cheque to Schrieber, it struck him that he had done wrong, and yet he does not appear to have asked back the cheque.

7th.—According to the Insolvent's statement so far from being unwilling he was glad to make the payment—the act done was not adverse to his wishes. The request gave him the opportunity of doing that which he was glad to do.

It appears to be one of those mixed cases mentioned by Chief Justice Tindal, in which the Insolvent to accomplish objects of his own, was glad to make the payment and in which the creditor, before he knew of such a disposition on the part of the Insolvent, had requested payment. The Court, taking into consideration the statements made by the Insolvent and all the circumstances of the case, considers that the payment was voluntary and sees no reason to disturb the verdict.

Rule discharged.

D'ALMEIDA & ANOR. v. GRAY.

Courts of Law, for the benefit of commerce, have always had a leaning in favor of the right of a ship-owner to a lien for *freight*, on goods shipped on board his vessel; and with that object, where a vessel is let on charter, draw a distinction between cases where the ship itself is let out, [in which case possession of the ship is parted with, and there is no lien on the part of the ship-owner]—and cases where the mere carriage, or space of the ship is let out, [in which case the owner still retaining possession of the ship, retains a lien for freight]. SINGAPORE.
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The language of the charter party must be very strong, in order to exclude, under any circumstances, the lien of the ship-owner; mere words of letting and hiring appearing therein, will not themselves do so, where the other provisions shew they are used as mere words of contract for the capacity of the ship, and not a demise of the entire hull.

Where S. W. & Co., merchants of London, chartered of A. A. owner of the barque P., the said barque for a voyage from London to Singapore or Rangoon and back, for a fixed sum for freight which was to be paid by S. W. & Co's. acceptance at 3 months, and S. W. & Co. put up the ship as a general ship and thereby procured shipment of goods on freight, by several persons, and themselves also shipped goods therein, which they consigned to the plaintiffs for sale, drawing in advance on the plaintiffs against the value of the said goods; and thereafter the barque proceeded on her voyage with A. A., the ship-owner's Captain and crew on board, and safely reached Singapore with the said goods on board; but before she arrived, S. W. & Co. became bankrupt, and the Bill of Exchange given for the freight, and accepted by them, was dishonoured, whereupon the defendant, the Master of the barque, acting on behalf of A. A. the ship owner, refused to give up to the Plaintiffs, the goods of S. W. & Co. consigned to them, whereupon the plaintiffs sued him in trover therefor.

Held, that the ship-owner had a lien for his freight, which was only suspended by his taking the bill, but revived the moment it was dishonoured, as the cargo was then still in his possession through his servants,

Held also, that if the ship owner [A. A.] had, on receipt of the bill, negotiated it for value, but in a way not to render himself liable thereon, it would have operated as payment of the freight, though the bill was afterwards dishonoured; but as he had

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negotiated the bill, and as indorsee remained personally liable thereon, the taking of the bill, and negotiating it, did not operate as payment, when the bill was subsequently dishonoured.

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v.
GRAY.

This was an action of trover for certain quantities of merchandize shipped on board the barque *Pilgrim*, and which were claimed by the plaintiffs as consignees for value under certain Bills of Lading, which goods were detained by the defendant, the Master of the ship, on a claim of lien for unpaid freight. The facts sufficiently appear in the judgment.

Napier for plaintiffs.

A. M. Aitken for defendant.

Cur. Adv. Vult.

August 28. *McCausland, R.* In this case a Charter Party, dated at London, 6th December, 1855, was entered into between the owner of the barque *Pilgrim* and Messrs. Syers, Walker & Co., which is in the following terms:—

CHARTER PARTY.

LONDON, 6th December, 1855.

It is this day mutually agreed between Alexander Alexander, Esquire,

owner of the ship or vessel called *Pilgrim*, of the measurement of $\frac{3}{4}\frac{1}{7}$ tons, or thereabouts, David Gray, Master, now in the St. Katherine's Docks, London, and Messrs. Syers, Walker & Co., of London, Merchants, that the said ship, being tight, staunch and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to St. Katherine's Docks, and there load a full cargo of lawful merchandize, and therewith proceed to Singapore, or so near thereunto as she can safely get, and after discharging the outward cargo, load there ^{and}_{or} at Rangoon from the agents

of the said affreighter, a full and complete cargo of lawful merchandize, timber excepted, and not less than one-half of the cargo to be rice in bags and or other dead-weight. The cargoes to be brought to, and taken from alongside the vessel at the merchant's risk and expense, which the said merchants bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions and furniture, and being so loaded, shall therewith proceed to London, Liverpool or Glasgow, as ordered at port of loading, or so near thereunto as she may safely get, and deliver the same on being paid freight, as follows, viz:—For the voyage out and home six pounds five shillings per ton of 20 cwt. nett for rice in bags, other goods according to the custom of the port of loading. The Captain to sign Bills of Lading at any rate of freight without prejudice to this Charter, but the owners to have a lien on the cargo for all freight, dead freight and demurrage, in lieu of all port charges and pilotages. [Restraint of Princes and Rulers, the Act of God, the Queen's Enemies, Fire, and all and every other dangers and accidents of the Seas, Rivers and Navigation, of whatever nature and kind soever, during the said voyage, always excepted.] The freight to be paid on unloading and right delivery of the cargo, in cash, less two months' discount. Thirty running days are to be allowed the same merchants, [if the ship is not sooner despatched] for loading the said ship at London, forty running days for discharging at Singapore and loading at Singapore and or Rangoon. The homeward cargo to be

Intermediate freight for charterer's benefit but time of loading same to be counted as lay days. The vessel not to draw more than 16 feet on the outward passage. The brokerage is 5 per cent. on the amount of freight and primage by this charter party, and is due to R. G. Jones, Price & Co., on signing hereof [ship lost or not lost]. This ship to be reported at the Custom House, London, by R. G. Jones, Price & Co., Brokers, 3, Church Court, Clement's Lane, or by their agents at port of discharge, paying the usual commission.

in bags and or other dead-weight. The cargoes to be brought to, and taken from alongside the vessel at the merchant's risk and expense, which the said merchants bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions and furniture, and being so loaded, shall therewith proceed to London, Liverpool or Glasgow, as ordered at port of loading, or so near thereunto as she may safely get, and deliver the same on being paid freight, as follows, viz:—For the voyage out and home six pounds five shillings per ton of 20 cwt. nett for rice in bags, other goods according to the custom of the port of loading. The Captain to sign Bills of Lading at any rate of freight without prejudice to this Charter, but the owners to have a lien on the cargo for all freight, dead freight and demurrage, in lieu of all port charges and pilotages. [Restraint of Princes and Rulers, the Act of God, the Queen's Enemies, Fire, and all and every other dangers and accidents of the Seas, Rivers and Navigation, of whatever nature and kind soever, during the said voyage, always excepted.] The freight to be paid on unloading and right delivery of the cargo, in cash, less two months' discount. Thirty running days are to be allowed the same merchants, [if the ship is not sooner despatched] for loading the said ship at London, forty running days for discharging at Singapore and loading at Singapore and or Rangoon. The homeward cargo to be

discharged with all possible dispatch according to the custom of the port and ten days on demurrage, over and above the said laying days, at six pounds per day. Penalty for non-performance of this agreement estimated amount of freight. The ship to be addressed to the Charterer's Agents at Singapore and Rangoon, free of commission, who will advance the master sufficient cash for ship's ordinary disbursements free of commission, but paying 2½ per cent. interest and insurance thereon, and to be deducted from the freight. Charterers not to be responsible for appropriation of cash for disbursements, £450 to be paid the owners by Charterer's acceptance at three months' date from clearing at the Custom House.

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LAND, R.
1856.

D'ALMEIDA
v.
GRAT.

A. ALEXANDER.

Witness to the signature of }
A. ALEXANDER,
ANDREW WRIGHT. }

SYERS, WALKER & CO.

Witness to the signature of }
SYERS, WALKER & Co.
JAMES DARBY. }

This Charter Party was executed on the 6th December; on the 7th, the notice to load was given by the owner, and on the 8th December, in pursuance of the agreement in that behalf contained in the Charter Party, a Bill of Exchange, payable three months after date to order, was drawn by the ship-owner on the Charterers, Messrs. Syers, Walker & Co. for £450, *on account of freight per Pilgrim, as per Charter, dated 6th December, 1855.* This bill was accepted by them, payable at the Banking House of Messrs. Robarts & Co., London, and was endorsed over by the drawer to the Union Bank of Scotland, for value on his own account. This bill was afterwards duly presented for payment on the 11th April, 1856, the day on which it fell due, and was dishonoured, Messrs. Robarts & Co., stating that they had received orders not to pay; and it was returned to the drawer and duly protested for non-payment on the 12th April, 1856. The ship *Pilgrim* was put up in London as a general ship by Syers, Walker & Co., and goods were shipped on board of her by several merchants in London, consigned to their respective correspondents at Singapore, for which bills of lading were given by the defendant, and amongst other goods so shipped, 220 bales of merchandize were put on board by Syers, Walker & Co., expressed in their Invoices of the same, dated 1st January, 1856, to have been shipped *per Pilgrim*, London to Singapore, and consigned to Messrs. Jozé d'Almeida & Sons, for sale and returns on the freighters' account.

For these 220 bales of merchandize so shipped, a Bill of Lading was made out and signed by the defendant, dated at London, 2nd January, 1856, and handed to the freighters, stating, that these 220 bales of merchandize were to be delivered at the Port of Singapore to order or assigns, *freight for the said goods to be paid in London, ship lost or not lost.* In the invoices of these particular goods forwarded to the plaintiffs by the freighters, the plaintiffs are debited with the value of their goods, *including freight and insurance* to the amount of £3,885. 4. 6.

Mr. Joaquim D'Almeida, one of the plaintiffs, was in London at the time these shipments were made; and Syers, Walker & Co.,

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then and there agreed with him that the *Pilgrim* should be consigned to his firm at Singapore.

They also entered into an agreement with Joaquim D'Almeida, before his departure from London, that they could draw on his firm at Singapore, at three or four months' sight, for £3,400 against the Bill of Lading and a Policy of Insurance for 100 bales of mule twist, and 120 bales of piece goods per *Pilgrim*, consigned to his firm at Singapore; as appeared by the copy of the letter dated at London, on the 17th January, 1856, and addressed to Svers, Walker & Co. by Joaquim D'Almeida.

Accordingly, on the 18th January, 1856, a Bill of Exchange for Spanish Dollars 15,542.85 equivalent at the rate of exchange to £3,400, was drawn by them on the plaintiff's firm at Singapore, payable at sixty days after sight, and to be placed to account of shipment per *Pilgrim*. This bill was endorsed over by the drawers to the London Agency of the North-Western Bank of India, and was negotiated by them accompanied with the collateral security of the Bill of Lading and Policy of Insurance for the 220 bales of merchandize abovementioned.

On the 9th February, 1856, this last mentioned Bill of Exchange was transmitted overland *viâ* Marseilles from the London Agency of the North-Western Bank of India to David Duff, Esq., their agent at Singapore, for realization; and along with it was sent the Bill of Lading which had been deposited with the bank as collateral security. The overland mail, which was despatched from London *viâ* Marseilles, on Monday, the 11th February, 1856, reached Singapore on Saturday, the 22nd March, 1856; and on Monday, the 24th March, 1856, the Bill of Exchange so drawn on the plaintiff's firm at Singapore, was unconditionally accepted by the plaintiff Jozé D'Almeida in the name of the plaintiff's firm at Singapore; and, at the same time, the Bill of Lading for the 220 bales of mule twist and piece goods, endorsed in blank was transferred by Mr. Duff to the plaintiff, Jozé D'Almeida, in pursuance of a written authority to that effect from the freighters, bearing date at London, the 8th February, 1856, and addressed by them to the London agency of the North-Western Bank of India, as holders of said Bill of Exchange, and, by a letter, dated London, 9th February, 1856, and addressed by the freighters to the plaintiffs' firm at Singapore, the invoices for the 220 bales of twist and piece goods were enclosed; and the plaintiffs were thereby informed that the bill, which had been drawn on their firm at Singapore for £3,400, had been sold by the drawers to the London and North-Western Bank of India, as against the shipments by the *Pilgrim*, as per the invoices enclosed: and the plaintiffs were further directed by said letter to quit the goods of the freighters, so consigned to them, as they should think fit, but not to miss a fair profit, where one could be realized. This letter also apprized the plaintiffs at Singapore, that the writers had been obliged to give the consignment of the *Pilgrim* away to a larger shipper by her; adding the words—"unfortunately; for she is *chartered by us*." The letter then goes on to treat of previous consignments from the writers to the plaintiffs' firm

at Singapore, as their agents and factors; and to make arrangements with them as their agents for further proposed operations.

The *Pilgrim* sailed from London, on the 12th day of January, 1856, and arrived at Singapore on the 16th day of June, 1856.

The cargo was in due course delivered ex-*Pilgrim* by the defendant, her master, to its several consignees at Singapore, but withholding from the plaintiffs the 220 bales of twist and piece goods until his demand for the full amount of the *Pilgrim's* outward freight to Singapore should be paid by the plaintiffs, as assignees of the Bill of Lading of the goods of Syers, Walker & Co., and this demand the defendant based upon the contents of the Charter Party, a copy of which he had in his possession, and also upon the fact, that, upon or shortly after his arrival at Singapore, he had received notice from his employer, the ship-owner, that the Bill of Exchange for £450 had been dishonored, and that the freighters had been declared Insolvents.

Under these circumstances, the plaintiffs commenced an action of trover on the 15th July, 1856, claiming to recover Spanish Dollars 2,800, for the wrongful detention by the defendant, as is alleged, of thirty bales of No. 40, White Cotton Twist or Mule Yarn of the value of Spanish Dollars 2,520: to which the defendant on the 29th July, 1856, filed a plea of not guilty. The case was most ably argued before me, on the 21st August, 1856, by Mr. Napier for the plaintiffs, and by Mr. Aitken, for the defendant.

For the defendant, it was contended that the moment the freighters put their goods on board the *Pilgrim*, on the 1st January, 1856, the ship-owner's lien for the entire freight of the ship attached upon their goods; and could not be discharged by any transactions which subsequently took place between the freighters and the plaintiffs, whether in London or at Singapore. That by the express terms of the Charter Party, the ship owner reserved to himself a lien on the cargo for all freight, dead freight and demurrage. That the Bill of Lading was not conclusive as between the ship-owner and the freighters; and that the plaintiffs, as assignees of the Bill of Lading, must hence take it subject to all its equities in the hands of the freighters. That by the letter of the freighters, dated 9th February, 1856, received by the plaintiffs at Singapore, on the 23rd March, 1856, the plaintiffs had *express notice* that the *Pilgrim* was chartered by them; and the voyage being broken off by reason of their insolvency, there being no agent of theirs at Singapore to procure a homeward cargo for the ship, the goods of the freighters detained on board the ship by the defendant, are liable to make good the ship-owner's claim to be paid the full freight of his vessel for the outward voyage upon a *quantum meruit*, irrespective of any contract, the terms of which have not been observed by the freighters.

Now ships being articles of great value and the freights amounting to large considerations, the Courts of Law have always expressed a disposition to favour the right of lien for freight, whether under Charter Parties or Bills of Lading; and have accordingly, been very reluctant in admitting such doctrine of

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constructive possession in the freighters even of a whole ship, as under strict rules of law would divest the owner of the right of lien; a right with which no prudent ship-owner will readily part. Upon this principle the Courts, in a series of decisions from *Vallejo v. Wheller*, Cowp. 143, to *Christie v. Lewis*, 2 Brod. & Bing. 410, have taken a distinction between those cases where the *ship itself* is let out; and those where the mere carriage, or *space* of the ship is let out. In the first cases, the possession of the ship is clearly parted with, and belongs to the freighters; and in such cases, there being no possession, actual or presumptive, reserved to the owner, there is no foundation for the right or exercise of lien for freight. But where the *capacity* or *space* of the ship is only let out, then the possession remains with the ship-owner; and having an actual possession of the goods, he may of course retain them, where necessary, in lien for freight. The terms of the Charter Party, or the nature of the service, must determine under which of these contracts the ship is let; and the right of lien will follow the nature of the original agreement. But in almost all cases of this kind, the Court is disposed, from motives of justice as well as policy, to favor the lien of the owner. The language of a Charter Party must be very *strong* indeed to exclude, under any circumstances, the lien of the owner. Mere *words of letting and hiring* will not of themselves invest a party with the possession of the ship, if the other provisions of the instrument and the nature of the contract qualify and restrain the words, and shew that the *hiring and letting* were not used in their positive sense and signification, but as mere terms of contract for the whole capacity and use of the vessel, and not as words of demise of the entire hull of the ship. In the present case there are no words of demise contained in the Charter Party; the ship-owner keeps possession by his master and his crew; after discharging the outward cargo at Singapore, the vessel is to load there or at Rangoon a full cargo from the agents of the affreighters; the cargoes are to be brought to and taken away from alongside by the merchants themselves, and at their risk and expense; and being so loaded she is to proceed on her homeward voyage as ordered at the port of lading. To use the words of Lord Tenterden in the case of *Saville v. Campeon*, 2 B. & Ald. 503—"It would be an act of great imprudence "on the part of the ship-owner to enter into a contract which "may have the effect of employing his ship for a long time, and "at a great expense to himself, without any remuneration, if the "person with whom he contracts should happen to fail before the "termination of the voyage." I am, therefore, disposed to interpret this Charter Party in a sense agreeable to the nature of the contract that a prudent ship-owner would make, preserving to the owner the possession of his ship, and his lien for freight on the goods carried by her. But it is contended on the part of the plaintiffs that in the present case it would be unreasonable and contrary to the intention of the contracting parties to enforce this right of lien, the owner having expressed his intention to take the personal security of the freighters for his demand, and having in

part carried that intention into execution by the drawing of the bill of the 8th January, 1856, upon them, at 3 months for £450 for freight, as per Charter of the 6th December, 1855. To this proposition, I cannot assent; the right of the ship-owner to resort to the cargo for payment of so much of the freight was only suspended during the time this bill had to run; and his right of lien revived the moment his bill was dishonored by the freighters, provided any portion of the cargo remained in his possession at the time he had notice of the dishonor. [See *Stevenson v. Blacklock*, I. M. & Sel. 535.] If he had negotiated this bill for value, and without rendering himself liable upon it, it would have operated as payment though dishonored; but having negotiated it so as to render himself personally liable upon it, it did not operate as payment when dishonored, and therefore he had a right, by the hands of the defendant as his servant, to retain the goods in his possession and not delivered. [See *Bunney v. Poyntz*, 4 B. & Ald. 568; and *Miles v. Gorton*, 2 Cr. & Mee. 504.]

Now with respect to the extent of the lien of the owner, he has clearly a lien for the whole freight against the goods of the freighter. In Molloy's *Treatise de Jure Maritimo*, page 528, it is thus written—"The lading of the ship in the construction of the Law is tacitly obliged for the freight; the same being, in point of payment, preferred before any other debts to which the goods so laden are liable, though such debts, as to point of time, were precedent to the freight; for the goods remain as it were bailed for the same, nor can they be attached in the master's hands, [though vulgarly it is conceived otherwise.]" With respect, however, to the goods of the sub-freighters the owner's lien is of a more limited extent; and he is entitled to receive from each sub-freighter, or the consignee of such sub-freighter, no more than is due for the conveyance of his particular goods, *Paul v. Birch*, 2 Atk. 261; *Christie v. Lewis*, 2 B. & B. 410; and *Faith v. East India Company*, 4 B. & Ald., 630. The considerations are, perhaps, not necessary in deciding the present case, for the owner is, by the express terms of the Charter Party, "to have a lien on the cargo, for all freight, dead freight and demurrage."

But, it is further contended on the part of the plaintiffs, that they had no notice of the existence of this Charter Party, and that their rights are those of assignees for value of the Bill of Lading without notice of this Charter Party, either express or implied.

There is no direct evidence to fix Joaquim D'Almeida with notice of it, though it is hardly possible to suppose that, when he entered into an agreement with the freighters in London, in January, 1856, to consign the vessel to his firm at Singapore, he should not have been aware that the vessel, was chartered by the freighters. But, as to his partner Mr. Jozé D'Almeida, it appears from the letter of the freighters, bearing date the 9th February, 1856, which was received at Singapore, on the 23rd of March following, that he must have known upon that day, and before he accepted the bill for £3,400 on the 24th, not only that the vessel

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was chartered by the freighters; but that the consignment of the vessel had been taken away by the freighters from the plaintiff's firm, and given to another larger shipper by her, Messrs. A. L. Johnston & Co., of Singapore;—"unfortunately" as the writers add. Besides, the same letter mentions that at the time of writing it, Mr. Joaquim D'Almeida was on the continent; and that fact is suggested by the freighters as an excuse for not being able to get him to alter the terms of the letter he had given to them, authorising them to draw on the firm at Singapore at three or four months' sight for £3,400, instead of which the bill is mentioned, as having been drawn by them at 60 days after sight. It was surely no more than what common attention to their own interest required, for Mr. Jozé D'Almeida to have made some enquiry, as to the relations in which the freighters stood towards the owner of the ship under their *Charter*, as well as towards the plaintiffs themselves, before he pledged the good faith of his firm by his unconditional acceptance of the freighters' bill for £3,400.

It was a fraud on the part of the freighters to include the amount of the freight in the consideration for the bill for £3,400, of which it formed a part, and which they negotiated for value with the London and North-Western Bank of India, and then dishonor their acceptance of the owner's bill for £450, drawn on them on account of this same freight; and to entrap the plaintiffs into becoming assignees of the Bill of Lading subject to all its liabilities in the hands of the freighters, and therefore liable to pay the entire amount of freight that was due by them. Again, referring to the Treatise of Molloy *de Jure Maritimo*, page 257, it is stated: "The Charter Party does settle the agreement, and the Bills of Lading the contents of the cargo; and binds the Master to deliver them well conditioned at the place of discharge, according to the contents of the Charter Party or agreement." In this case the Charter Party did settle the agreement between the owner and the freighters, and the Bill of Lading was conclusive only as to the contents of the goods described in it, and in binding the master to deliver them up in good order and condition at the port of Singapore. It could not operate as an estoppel between the owner and the freighters, nor between the defendant, as the servant of the owner, and the plaintiffs as assignees of the freighters, nor could its transfer, impair or diminish the exercise of the owner's right of lien on the goods described in it. Whatever, therefore, may be the hardship of this case, it appears to me that the title of the owner to his lien on the goods of the freighters is prior in point of time to that of the plaintiffs as indorsees of the Bill of Lading, and is to be preferred to the plaintiffs title under the indorsement,—[see *Small v. Moutes*, 9 Bing. 574], and consequently there must be judgment for the defendant, with costs.

CHASSERIAU v. MATHIEU & CO.

Plaintiff and defendants entered into a contract in writing, by which plaintiff "engaged to deliver to the defendants, all sugar manufactured on his estate from 1st October 1857, to 30th June, 1858, both inclusive."

Held, that what was meant by the contract was, not that the deliveries should be made between the dates in question, but only that the sugar should be manufactured between those dates—and that the defendants were bound to accept all sugar manufactured on or before the latter date, and which was tendered to him within a reasonable time thereafter.

The sugar was tendered by plaintiff on the 12th July, 1858,

Held, this was within a reasonable time.

The sugar tendered, however, on that date (12th July) was in boxes, undergoing the process by which molasses are finally separated from the granulated sugar; and though the upper portion in each box was what in commerce would be considered "sugar," still the whole mass taken together would not be so considered—though planters would call it sugar.

Held, that the article tendered was not "sugar" manufactured by the 30th June, and the defendants were not, therefore, bound to accept same, nor even that portion of it as had granulated, but which could not be separated from the rest.

Query. Whether if the separation could have been effected, the defendants were bound to have done so, and to accept the granulated portion?

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August 18.

This was an action for the non-acceptance of certain quantities of sugar. The facts and points raised sufficiently appear in the judgment.

The parties appeared in person.

Cur. Adv. Vult.

August 23. *Maxwell, R.* In this case the plaintiff sued the defendant for refusing to accept 200 piculs of sugar in pursuance of a contract, of which the only material portions for the purposes of the question between the parties are the following:

"1st.—Mr. Chasseriau engages to deliver to Messrs. Mathieu & Co., all sugar manufactured on his property, Tuddenham Estate, from the 1st of October, 1857, to the 30th of June, 1858, both inclusive; the quantity estimated between 3,500 and 5,000 piculs.

"2nd.—Messrs. Mathieu & Co., engage to pay him at the rate of \$6½ per picul for the first and second qualities, on the condition that the sugar shall be perfectly dry, and that it shall not be inferior to the musters given by Mr. Chasseriau. The 2nd quality not to exceed 15 per cent.

"3rd.—The payments to be made on the delivery of the sugar."

On the 30th June, the plaintiff wrote to the defendant, "I have the pleasure to let you know that my crop is finished, and also to inform you that I have in my sugar boxes, about 230 piculs of sugar fabricated for you according to our contract. I will make all dispatch to send it to you, and hope to do so before the 10th of July."

To this letter the defendant replied on the 1st July, that the contract was at an end on the preceding day; and when sugar to the amount of 200 piculs was tendered to the plaintiff on the 12th of July, he declined to receive it.

It appeared at the trial, on the 18th instant, that no part of the sugar in question was, on the 30th of June, perfectly dry or equal to sample. It was in boxes undergoing the process by which the molasses are finally separated from the granulated

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sugar. The upper portion of it in each box was, what would in commerce be considered sugar; but the whole mass taken together would not, according to the evidence of the witnesses, come under any of the known qualities of sugar in the market. It appeared, however, that planters would call the whole sugar; for they call the substance by that name as it is granulated.

It was contended by the plaintiff that the sugar in question was manufactured on or before the 30th of June, within the true meaning of the contract, and that the defendant was therefore bound to accept it. The defendant, on the other hand, insisted that he was not bound to accept any sugar whatever, after the 30th of June; but that if he was, the sugar which had been tendered to him was not, on that day, such sugar as he was bound to accept.

I held, at the time, that the meaning of the contract was, not that the deliveries should be made between October and June, but that the sugar should be manufactured within those dates. If the period of time had been intended to apply to the delivery of the sugar, the words would have occurred earlier in the sentence. The agreement would have stated that Mr. Chassériau engaged to deliver between October and June all sugars manufactured, &c., and not, that he engaged to deliver all sugar manufactured between October and June. The words cannot grammatically refer to both delivery and manufacture, and if I were at liberty to speculate on what the parties may possibly have meant, I should doubt whether the words were really intended to refer to both; for the parties can hardly have intended that sugar only manufactured on the 30th of June, should be packed, transported and delivered on the same day. I therefore held that the defendant was bound to receive all sugar manufactured on or before the 30th of June, which was tendered to him within a reasonable time after that day.

The question then arose whether the sugar tendered on the 12th of July, which I thought a reasonable time, was, on the 30th of June such manufactured sugar as the defendant was bound to accept; and, on consideration, I think that it was not.

It is not necessary to enquire in what sense the word "sugar" must be understood in a mercantile contract such as this; for I think that the parties have given their own definition of the word in their agreement. Although the plaintiff undertakes to deliver all sugar manufactured on his estate, generally, that which alone the defendant contracts to receive is sugar which, besides being manufactured there, possesses the two additional qualifications of being perfectly dry and equal to sample; and this is, I think, the only kind of "sugar" which was the subject of the contract. It is the only kind of sugar which was, in the contemplation of the parties, to be manufactured between the 1st of October and the 30th of June. The sugar tendered was not, the plaintiff admits, of that description at any time between those dates; it was not, at the date, what both parties understood by sugar when they contracted to deliver and accept sugar; and it was not, therefore, in my opinion, such sugar then, as the defendant was subsequently bound to accept.

If I am wrong, however, in the view of the case, I think, the plaintiff would still fail in this action. If I were to reject the meaning which, I think, the parties have attached to the term, I should still have to decide what the parties meant by it, and I should hold that when a planter agrees to supply a merchant with sugar manufactured on his property, the intention is that the substance shall be in that condition in which it is recognised as sugar in the market of the world,—this being the general or popular meaning of the word, and there being no adequate reason for giving it any other. Now, of the whole quantity tendered for acceptance, the plaintiff admits that only a portion was in the condition of marketable sugar on the 30th of June. The defendant, then, would not have been bound to accept more than that portion, but as more was tendered, and it was not in his power, from the nature of the article, to separate the part which might have been properly tendered, from that which he was not obliged to take, he was at liberty to reject the whole. Even, if he could have made the separation, it is very doubtful, whether, he would have been bound to do so. The Court of Queen's Bench was recently divided on the point [a]. For these reasons, I think, that the defendant is entitled to judgment.

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The cancellation of a deed, does not, in law, divest the estate out of the person in whom it was vested by the deed.

Where land is first described in a deed by name, or by distinct ascertained boundaries, any additional description inconsistent with the first, has no effect.

Thus, if lands are conveyed by definite boundaries, but is subsequently by the same deed said to contain a certain area, but it is afterwards discovered that such area is either more or less than that which is actually contained within the boundaries given, such additional description of the area in the deed is immaterial, and will be rejected.

Query. Will equity relieve in such a case between the parties, by awarding compensation?

Where land is conveyed by distinct boundaries, the representation of either of the parties to the other, that the land contains a certain area, is immaterial,—unless it is proved that such representations were made fraudulently, and knowing them to be false.

This was an action of ejectment. The facts giving rise to same, and points of law arising therein, are so fully set out in the judgment, that they need no mention here.

Plaintiff in person.

Branson, for defendant.

Cur. Adv. Vult.

September 25. *Maxwell, R.* In this case, the question which I have to decide is, whether the plaintiff is entitled to a piece of jungle land lying to the northward of the hedge of his spice plantation in the district of Ayer Itam. This question has arisen in consequence, partly, of the great laxity which formerly prevailed on the part of

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[a] *Levy v. Green*, 27 L. J. Q. B. 111. See *Hart v. Mills*, 15 M. & W. 85.

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the local authorities in describing, in their grants, the boundaries and the areas of the lands granted, and partly also, of the negligence of land-holders in marking out their boundaries upon the ground. The cause of this negligence is clear enough in the present case, since both parties to the action, if agreed on no other point, concur in admitting that the land in dispute is almost of no value. This circumstance, however, though it may make the result of the decision a matter of little importance to them, in no way affects, I need hardly say, the difficulty of the question to be solved; and I have given the subject, therefore, as careful a consideration as if the fortunes of the litigants were at stake. I have done more; as the parties are not lawyers, and one of them has not had the advantage of legal assistance, I have gone into the question with a degree of minuteness which under other circumstances I should not have thought necessary; because I wish that the parties should not only know what my decision is, but understand exactly the grounds of it.

The facts of the case are these. The late Mr. Brown was seised among many other lands, of two pieces comprised in two Government grants dated 1805, and numbered respectively 1618 and 1667. The land comprised in the former was described as granted to Mr. Christopher Smith, and as bounded to the east and south by the Ayer Itam road, to the north by Capt. Scott's ground, and to the west by a river and the Company's ground. The first three boundaries were from the beginning, clearly marked and ascertained. Capt. Scott's ground is bounded by a ditch, about which there is no more dispute than there is or can be about the Ayer Itam road, for I see it is mentioned as already in existence in the grant of Scotland estate which is dated 1802. The length of those boundaries also is given. The eastern measures, 5 orlongs; the northern, 16 orlongs 10 jumbas; the southern, 13 orlongs 7 jumbas. The two western extremities of the last two boundaries are consequently accurately ascertained; but the western limit cannot be laid down according to the language of the grant. It is described as measuring 6 orlongs 17 jumbas, whereas the shortest line that could be drawn to unite the two western ends of the road and ditch would be nearly double that length. The land comprised in the grant was estimated at 88 orlongs 8 jumbas; but such a line as I have supposed for the western boundary would include within it and the ascertained limits, a much larger area. In 1809, however, the Government Surveyor, Mr. McCarthy, make a survey of this part of the Island. By what means he laid down the western boundary—whether he found it already marked by a ditch or hedge, or whether he followed any stream, or the limits of cultivation, or of actual possession by Mr. Smith, does not appear; but his map shews a distinct line at the western end, uniting the road and Capt. Scott's ditch; and the reference book which accompanies it, states that the grant 1618 contained 125 orlongs 19 jumbas, that it was under cultivation with pepper, and that it was bounded by the Ayer Itam road, Scotland estate and “the hills,”—by which “forest” was probably meant, as the land to the westward continues flat for some dis-

tance. Whether this survey was correct or not, is immaterial. It is evidence, and strong evidence, that whatever blunders may have occurred in describing the western boundary, or in estimating the area of the land granted by this grant, that boundary was fixed as far back as nearly 50 years ago, and the land held under the grant by the grantee consisted of about 125 orlongs. There is no evidence that this boundary was ever changed or the area diminished; and the letter of the plaintiff of the 23rd of October, 1833, to which I shall presently refer, shews that at that time it was in the same condition. This estate was purchased by Mr. Brown, and with the exception of a small portion,—five orlongs, at its south eastern extremity, which were sold in 1815,—he died seised of the whole of it.

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The position of grant 1,667 has, perhaps, never been accurately ascertained, but it is admitted by the parties that it lies, in part at least, to the westward, and adjoins grant 1,618, and that it comprises the land in dispute which is enough for the purposes of this action.

By a deed dated 5th March, 1833, George Stuart, one of the Executors of Mr. Brown, conveyed to the plaintiff, in consideration of 1,000 dollars, all that piece of ground, &c., being part and parcel of a larger piece more particularly mentioned and described in grant 1,667, and forming part of the spice concern. The deed then described the land conveyed by its boundaries, the north-western being "the hills, and measuring on that side 16 "orlongs, 18 jumbas," [4,056 feet], and added that the area was estimated at 100 orlongs 7½ jumbas. No question has been raised as to Mr. Stuart's power to convey this land, and, therefore, I assume that he had it.

On the 23rd October, 1833, the plaintiff wrote to Mr. David Wordlaw Brown, the son and devisee and another of the Executors of the late Mr. Brown, "the ground I want at Ayer Itam is "just the whole of that which I first spoke to you about, viz:—"formerly Smith's property, and now bounded by Harrow's "ground, my ground, and the road to Amee's mills." That road is obviously the Ayer Itam Road, Harrow's ground, it is admitted, is Scotland Estate, or the property described in the old grant numbered 1,618 as Captain Scott's ground, and "my "ground," must mean the portion of the land which the plaintiff had purchased. In a word, this letter points plainly to the land in grant 1,618, as described and laid down in McCarthy's survey.

Some doubts appear to have occurred about this time, as to whether the land purchased in March was wholly comprised in grant 1,667, or whether a portion of it was not included in grant 1,687; and an arrangement was accordingly proposed by the plaintiff to Mr. David Wordlaw Brown, which is best described in a letter which he drew up, and which was to be addressed to him by Mr. Brown. "With reference" says this letter, "to the "survey we had this morning, and to the doubts, as to whether the "100 orlongs I lately sold you at Ayer Itam is, as stated in the "Bill of Sale, a part of grant 1,667, or, whether, it does not also "include grant 1,687, I have not the slightest objection to renew

MAXWELL, R. or modify the Bill of Sale in any way that will satisfy your mind;
 1858. and as you are desirous of purchasing the property adjoining,
 IBBETSON *vis*: grant No. 1,618, together with the small piece of jungle
 v. suppose to be part of grant 1,670, the most satisfactory
 BROWN. way of arranging the matter will probably be [it being impossible
 to define the boundaries of each part] to cancel the present
 Bill of Sale for another commencing: "In consideration of the
 "sum of 2,000 dollars, I hereby sell the land at Ayer Itam, esti-
 "mated to contain about 200 orlongs, bounded as follows." The
 letter then states the boundaries in the same terms as they are
 described in the deed of November, hereafter mentioned, with
 the exception of the northern, which is said to be a line drawn
 round the hills.

It appears, then, that the plaintiff's object, and the object
 of Mr. D. W. Brown, if he wrote that letter or otherwise
 adopted it, was twofold; first, that the plaintiff's title to the
 land bought in March should be confirmed, and secondly, that all
 the land that Smith had held under grant 1,618 should be convey-
 ed to the plaintiff.

By a deed poll, dated the 11th November, 1833, George
 Stuart and D. W. Brown, as Executors of the late Mr. Brown,
 conveyed to the plaintiff, in consideration of 2,000 dollars, certain
 pieces and parcels of land which were described in the first place
 as consisting of,—

- [a] The whole of the land comprised in grant 1,687.
- [b] A portion of the land comprised in grant 1,667.
- [c] The remaining portion of the land in grant 1,618.
- [d] A portion of the land in grant 1,670.

These parcels were next described as being enclosed within
 certain boundaries, *viz*: on the east by the Ayer Itam Road 1,080
 feet, on the south the same road to the boundary of Amee's mills
 and boundary hedge, and old road to the Flag Staff, measuring
 5,680 feet, on the west by the same hedge and road, 1,350 feet, to
 the foot of a range of hills. Returning to the eastern boundary,
 the deed described the land as being bounded to the northward
 by the property of the children of Haroo for 4,300 feet, ending
 also at the foot of a range of hills. These boundaries, I may
 observe before proceeding further, comprise the three boundaries
 of grant 1,618 which were always free from difficulty. The east-
 ern boundary is exactly the east boundary of grant 1,618; and so
 is the northern, Captain Scott's ground, or Scotland Estate, then
 belonging to Haroo's children; and the southern is the southern
 boundary of grant 1,618 protracted about 2,400 feet.

The whole area is then closed as follows:—"The two points
 "ending at the foot of the hills are connected by a line drawn
 "from one to the other a little above the base of them, and mea-
 "suring about 6,000 feet bounded all the way by the Honorable
 "Company's lands or original forest."

The deed then states, that the area of the tract thus bounded
 as "estimated to contain 200 orlongs, as per plan and survey
 "thereof signed" by the vendors, excepting the few orlongs sold
 in 1815. This explains what the deed meant by "the remaining

"part of 1,618." It meant the whole of 1,618 minus these five orlongs. The plan and survey referred to are not now forthcoming. The plaintiff tendered a plan which was said by Mr. Loureiro, of the Land Office, to bear the hand-writing of Long Mahomed Ali, the Government Surveyor in 1833, and which was also proved to bear the hand-writing of Mr. Charles Scott, who ceased to be the plaintiff's agent in 1841 or 1842; but, as it was not signed by the vendors, nor proved to be a copy of that which was so signed, I think, it is not evidence against the defendant in this action.

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Shortly after the purchase, the plaintiff returned to Europe, leaving his newly purchased property in the hands of the gentleman just mentioned, Mr. Scott, who proceeded to form a nutmeg plantation upon that part of the land which lies south of the boundary in dispute and enclosed the trees within a bamboo hedge. The land in dispute lies chiefly to the north of that hedge, and the plaintiff gave some general evidence of acts of ownership done by him through his servants; that is, they cut wood there when they wanted it. The defendant also proved similar acts done by him as the agent of Mr. D. W. Brown; but as none of these acts date farther back than 1850, I am of opinion that if the land was ever conveyed to the plaintiff he has not lost his right to it by lapse of time. It was not, in fact, until 1849 or 1850, that any part of the land beyond the plaintiff's boundary was supposed to belong to Mr. Brown, or was claimed or occupied by him. In the deeds of 1833 the plaintiff's land was described as bounded by land belonging to the Company, and as far as the evidence before me goes, it continued to be so regarded until about the time I have just mentioned; when Mr. Moniot, the Government Surveyor, in surveying the district, considered that the remainder of grant 1667 lay in that direction.

The question upon which this action turns, is what land, and what quantity of land became vested in the plaintiff on the execution of the second deed. The plaintiff contends that he was thereby confirmed in his right to the 100 orlongs which he purchased in March, and further that he acquired the whole of the land held under grant 1618, as laid down in Mr. McCarthy's survey, minus the five orlongs sold in the year 1815. But, the defendant contends that no more than about 200 orlongs ever were vested in the plaintiff; and I understand his argument in support of this view to amount to this:—that the transaction of March was annulled, and must be treated as if it had never taken place; that the transaction of November was, in substance and effect, a purchase of 200 orlongs at ten dollars an orlong; and that as the area within the admitted boundaries and the plantation hedge measured 215 orlongs, which is the fact, the plaintiff had within that hedge all, yea more than all, that he was entitled to.

I think this reasoning erroneous. In the first place, the defendant has mis-apprehended the effect of the cancellation of the deed of March. The cancellation of the deed does not, in law, divest the estate out of the person in whom it was vested by

MAXWELL, R. the deed. "I hold it clearly," says Eyre, C. J. in *Bolton v. Carlisle*, 2 H. Blacks: 259, "that the cancelling a deed will not
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divest property which has once vested, by transmutation of
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"possession." In *Hudson's Case*, Prec. in Ch. 235, a father, after a quarrel with his eldest son, executed a deed settling £100 a year on his wife. He afterwards became reconciled with his son and cancelled the deed. But the instrument, upon proof of its having been duly executed, was held a good and valid deed, notwithstanding its cancelled state. So, when a lease was delivered up and cancelled upon the tenant getting a new one, and the latter lease turned out to be void, it was held that the old one was still good, and might be set up by the tenant in an action of ejectment, *Ros v. Archbishop of York*, 6 East, 86. But treating the question as one purely of intention, I do not think that in the present case, the cancellation was designed to have the effect of divesting the property out of the plaintiff. I see no ground for supposing that the parties desired that the transaction of March should be revoked or rescinded, and that they should begin it again *de novo*, I think, indeed, that they would have been much surprised, if they had learned that the effect of the second transaction would be to take away from the plaintiff any part of the land which he had already bought, what the parties intended, it seems to me, was to confirm the first purchase, and to include both lands in one deed and within one boundary; or in the words of the defendant in his letter of the 8th of January last, "to lump into one Bill of Sale" the two purchases. The letter which was drafted by the plaintiff for Mr. D. W. Brown to serve as instructions for drawing the deed of November, and which, whether written or not, was evidently adopted by him, as the defendant himself represented, shews clearly what their intention was. "With reference to the doubts," it says, "as to whether the 200 orlongs, I lately sold you at Ayer Itam is, as stated in the Bill of Sale, part of grant 1,667, or whether it does not include also grant 1,687, I have not the slightest objection to renew or modify the Bill of Sale in any way that will satisfy your mind." The object aimed at was manifest: by the confirmation, not the rescission of the sale of March; and the cancellation of the deed had not the effect of thwarting that end. Even, if that deed be treated as void *ab initio*, conveying nothing to the plaintiff, it seems clear that the parties desired, not to treat it as such, but to give it all the effect they could by another instrument.

It follows, then, that the land conveyed to the plaintiff in March continued vested in him; and what the quantity of that land was, is not disputed. It was 100 orlongs. Nor is it now disputed that the piece of land conveyed in March was wholly comprised in grant 1,667; for the parties concur in stating grant 1,687, which, it was thought in November might perhaps include a portion of it, lies in a totally different direction, where, then, are the 100 orlongs in question? The defendant contends that they are to be found south of the plaintiff's plantation hedge; and he makes this out thus:—Grant 1,618, he says, is mis-

described by McCarthy ; its true position is represented by an area of about 88 orlongs enclosed by the Ayer Itam Road on the east and south, and on the north by a line, no longer following the ditch of Scotland Estate, it is true, but meeting another line of 6 orlongs 17 jumbas in length, which unites it with the south limit, and forms the western boundary. We thus preserve the east and south boundary of the grant ; we get at the west, a boundary of the exact length given in the grant ; and we get, further, exactly the area which the grant was estimated to comprise. The space between the proposed north boundary and the ditch of Scotland is part of grant 1,667, and just supplies the quantity of the grant which the defendant says, he has not got ; and as that grant was made to Christopher Smith and Captain Scott, the land comprised in it may not inappropriately have been called Captain Scott's ground. Thus the northern boundary now proposed answers the description given in the grant, for the land would be bounded on that side by Captain Scott's ground. In fewer words, the defendant suggests that McCarthy's west boundary should be shortened to the length given in the grant, and that the north boundary should be moved down to meet the shortened line. The date of grant 1,667, however, offers a difficulty to this arrangement ; for it was not granted till a month after grant 1,618, and the land comprised in it could therefore hardly have been described in the earlier grant as Captain Scott's ; nor is it likely that Mr. Smith would have had land which belonged to himself and Captain Scott jointly, described in another grant as Captain Scott's exclusively. Grant 1,618 then, could not have been laid down, even in McCarthy's time in the manner proposed. But independently of these trifling points of detail, far graver objections arise. The defendant has forgotten how important an element time is in questions of this kind. Even, if this theory were not open to the palpable objections just indicated, it would be out of the question to change boundaries which have been ascertained and defined for half a century, and according to which the land has been known and enjoyed during all that time.

But there is another and even more obvious objection to this proposition. Read the grant 1,667 as you will, it is impossible to place any portion of the land comprised in it, within that long angular space between Scotland ditch and the proposed north boundary. Even if it were, there would remain the difficulty of shewing that that portion was comprised in the deed of March. If the boundaries given by that deed are considered, it is impossible to find any portion of the land thereby conveyed, within that space. The property then conveyed would have been described as bounded on the north in part by Scotland estate, and south in part by Brown's, formerly Smith's land ; but nothing of the kind, nothing reconcilable with such a description, is to be found. Again, the plaintiff, as the defendant mentions in one of his letters, took possession of his first purchase in March, eight months before the second purchase ; but it has not been shewn or even suggested that he entered upon the angular piece of land now

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under consideration. If he had, he would hardly have described in November the land which he desired to purchase, Smith's ground, as bounded by Haroo's. In short, what the plaintiff obtained by the deed of March was not simply 100 orlongs of grant 1,667, but a hundred specific orlongs bounded within given boundaries, and the piece of land in question, even if it was part of that which was included in grant 1667, is manifestly not part of the specific 100 orlongs conveyed to the plaintiff in March.

Immediately before the execution of the deed of November, then, the plaintiff stood seised of 100 orlongs, part of grant 1,667; and those orlongs did not lie within the boundaries assigned by McCarthy to grant 1,618. If this be so, the plaintiff has not got those 100 orlongs within the plantation hedge and his other boundaries, and it is admitted that if there be a deficiency in his quantity, it must be made good from the land in dispute. This is enough to entitle the plaintiff to judgment in the present action. But it may be as well to consider further the defendant's proposition, that the real bargain between the parties was for 200 orlongs or thereabouts and no more. Let us see, in the first place, what it was that the plaintiff desired to buy. Having already 100 orlongs, he writes to purchase another piece of land. How does he describe it? Not as 100 orlongs of land lying near his first purchase, but as "the whole of that which I first spoke to you about, viz: formerly Smith's property, and now bounded by Harrow's "ground, my ground, and the road to Amee's mill." He does not say a word about the quantity. He asks for the whole of Smith's land, let it measure what it may. In the next place, what did the vendors intend to sell? By the deed of November, besides confirming the first purchase, they convey "the remaining part of "the land comprised in grant 1,618,"—that is the whole minus the five orlongs sold in 1815. If the deed had stopped here, there would have been no room for doubt. But taking his land and the land of grant 1,667 together; it estimates the aggregate area at at 200 orlongs; and as the first purchase consisted of 100, it follows that the second was estimated at the same amount. This estimated amount, the defendant contends, must be taken to control the previous more general description, and that amount therefore alone passed. But this is an error. The rule is well established, that where land is first described by its name, or by distinct ascertained boundaries, any additional description inconsistent with the first has no effect, Bac. Tracts, 102. "As soon," says Mr. Brown, [*Legal Maxims*, 490, 2nd Ed.] "as there is an "adequate and sufficient definition with convenient certainty, of "what is intended to pass by the particular instrument, any subsequent erroneous addition will not vitiate it. *Quicquid demonstratæ rei additur satis demonstratæ frustra est.*" Here the land was described by what was equivalent to its name or its boundaries. What was conveyed was not 100 orlongs comprised in grant 1,618, but all the land in grant 1,618, estimated to contain 100 orlongs. The first description indicates exactly what was the subject of conveyance. Under the conveyance of "the land comprised in "grant 1,618" all the land which had long been held as actually

included in it passed, although the area was wrongly estimated in the grant. In *Long v. Collier*, 4 Russ. 267, the defendant contracted to purchase certain copyhold lands and premises described as "situated at Moorstead, in the County of Southampton, as the same are now in the occupation of Bunney, as tenant of Walter Long, containing by admeasurement 219 acres, more or less." The property was described on the Court Rolls of the manor—like the registry in the Land Office—as containing only 71 acres; and the defendant refused to complete the purchase as no title was shewn to the remainder. But as it was shewn that the whole 219 acres had passed through a succession of proprietors by the description on the Court Rolls, the Master of the Rolls held that a good title was shewn to the whole. So here, all the land which had been held under grant 1,618 passed, and the erroneous estimate did not cut it down or affect it. It would be strange, indeed, if it would have any such effect; for if it could reduce the quantity when the estimate was in defect, it must *pari ratione* increase it when in excess. But in such a case, where is the additional land to be got from?

According to the plainest rules of law, then, the whole of the land comprised in grant 1,618, with the exception so often alluded to, passed to the plaintiff. And I think it equally clear that the whole was intended to pass. The plaintiff plainly asked for the whole. An examination of the boundaries given by the deed of November, shews that the land bounded on the north by the Scotland Estate and by the Ayer Itam road to the east and south, the three indisputable boundaries of grant 1,618, is all included; and I think the vendors would have been much surprised, if they had found, after executing that deed, that any portion of that land which had been known as Smith's still remained in them.

I think it, indeed, not improbable, on comparing the price paid with the estimated area of the land conveyed, that the price was calculated at the rate of 10 dollars an orlong; and if Mr. D. W. Brown had known that the land which was estimated at 100 orlongs in fact comprised 120, he would have demanded 200 dollars more for it. It is here that the mistake was made. If there was any mistake in the transaction, it was evidently not a mistake as to the land to be actually conveyed, but as to its price, arising from a rough, negligent and erroneous estimate of its area, and it was an error for which the vendors might perhaps have been entitled to compensation for the overplus.

But suppose that I am wrong here, and suppose also that only 100 orlongs of grant 1,618 were conveyed to the plaintiff—it follows, that he is in possession of more of the land of the grant than was conveyed to him. But how does the defendant propose that the vendor should recoup himself for the loss? He claims the right to take from the plaintiff a portion of the land in grant 1,667 in compensation for the excess which he holds of the land in grant 1,618. This is in effect his contention when he urges that, if the plaintiff has not got his full measures of land in grant 1,667, he must compensate himself with the superabun-

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dance of grant 1,618. "It appears a curious kind of argument," he says to the plaintiff, "that you appropriate all excess in any particular grant, but for any deficiency you are entitled to come back on the seller. You admit an excess of 42 orlongs in grant 1,618, but you say there is a deficiency in grant 1,667 which you wish made up. This I do not call even handed justice. I consider that even if you had bought grant 1,618 first, instead of last, as long as the aggregate quantity you held under both titles was equal to the quantity in the Bill of Sale, you have no right to more." Now this is not law, and would be rough justice. It amounts to this. The plaintiff complains that the defendant has evicted him from Blackacre. The defendant answers "true, I have committed the grievance you complain of; but 17 years before I did so, I sold you Whiteacre, and if you will measure it, you will find that it contains more land than I then believed it did, and I therefore now claim the right to take back from you an equal portion of Blackacre, which I had previously sold to you, and about which no mistake was committed." If the defendant could, in such a case, take anything back, in natural justice, one would think it would be the overplus of Whiteacre; but even then he would be met with much difficulty. What part should he take back? The wood, or the pasture, or the arable, or the marsh? The portion covered with buildings, or with water? Should he help himself to the north, south, east or west? To the portion which suited himself best, or to that which the plaintiff could best afford to part with?

As I said before, if the vendor had any redress for the error committed, it was a right to sue the plaintiff for compensation for the excess of land conveyed. In what cases vendors have this right, and whether Mr. Brown had it in this case, it is not necessary that I should express any opinion; for I have here only to decide whether the land in dispute belongs to the plaintiff or not. All that I need say upon the question is, that Mr. Brown cannot rectify the error or give himself redress in the manner suggested, viz., by ousting the purchaser from another piece of land. Nor am I called upon to pronounce any opinion upon another point which was urged in the course of the case, viz., whether Mr. D. W. Brown had been induced to execute the deed of November, by the plaintiff's representation that it did not comprise more than 200 orlongs. Whether he was or not, indeed, would be immaterial unless it were also alleged and proved that the plaintiff made those representations fraudulently and knowing them to be false; which I did not understand the defendant to allege, still less to attempt to prove. Even then, whether Mr. Brown might have obtained redress at law or in equity for the supposed fraud, it would have afforded the defendant no defence in this action.

The whole case, then, amounts to this. The plaintiff buys first a hundred orlongs of land, and afterwards an adjoining property which is estimated to contain another hundred, but which in fact contains some 30 more. This fact, notwithstanding the existence of McCarthy's survey, strangely remains unknown for 17 years, until the Government employ a man of talent and skill

in his profession, Mr. Moniot, again to survey the district, when it quickly comes to light, about the same time, the defendant takes possession of a piece of ground, honestly believing it to be the property of his principal, but which turns out to be neglected and unenclosed portion of the plaintiff's first purchase. The plaintiff, on discovering the defendant in occupation of it, demands it back, and the defendant declines to restore it, on the ground, either that it was taken back from the plaintiff on the occasion of second purchase, or if not, that there was a miscalculation of the area on the second purchase, and that the gain which the plaintiff then made by the error more than adequately compensates him for his present loss. This, when the case is sifted, seems to me to be the pith of the whole matter; but for the reasons which I have now at such great length and with so much minuteness given, I think that the defendant is wrong and that the plaintiff is entitled to judgment.

In deciding this, however, I hold only that the defendant trespassed upon some parts of the plaintiff's land north of the plantation hedge. What the true boundary of his land is, has not been proved and it is not necessary for me to decide. I think it right to say, however, that I do not consider that Mr. Brown is bound by the particular line of demarcation for which the plaintiff contended. The latter gave evidence, at the trial, to prove that Long Mahomed Ali, Government surveyor, laid it down at the time of the purchase; that it followed for about two-thirds of its entire length, proceeding from the eastward, an old bridle path, from which it then struck through the jungle and fell upon the 5 milestone on the Flag Staff road. This line rises, and continues for some distance, about 200 feet above the base of the hills. Now, when it was measured, the vendors were not present. There was no evidence that they had directed Long to make that measurement, or that they adopted it when made; and it certainly was not so described either in the letter of the 29th October or in the deed of the 11th November, as to be binding on them. Indeed, the only part of its description given in those documents, which admits of verification—its length, turns out to be erroneous, for such a line as indicated by the plaintiff does not much exceed half the alleged length of 6,000 feet. With respect to the defendant's objection, however, that any boundary giving the plaintiff 100 orlongs of 1,667, besides all the land in 1,618, would be inconsistent with that description, and also with the further description "a little above the base of the hills," all that can be said is, that the general description must be followed, and the inaccurate and inconsistent details rejected. This line has never been twice described in the same way. In the deed of March it is described as measuring 16 orlongs 18 jumbas, but nothing is said of its elevation. In the plaintiff's letter of October 29, it is described as drawn round the foot of the hills, and in the deed of November, as a little above their base. The hills are about 1,400 feet high according to the Government survey, and I am not prepared to say that a line 200 feet above their base is incorrectly described as "a little above them." If the line which gives

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With respect to the argument that such a line will encroach on the only 75 orlongs which remain to Mr. Brown of grant 1,667, the grant having been described as consisting of 175 orlongs, it is enough to observe that the plaintiff's title to his 100 orlongs cannot depend on the accuracy or inaccuracy of the estimate of the area contained in the original grant; for what he purchased was not a certain named proportion of the whole estimated area, but a fixed number of orlongs, and he would be entitled to the whole quantity if grant 1,667 did not contain another orlong.

I ought not to close my remarks on this case, without stating why I have not noticed arguments urged on both sides, which were founded on what the parties called the admissions of each other. For instance, the plaintiff contended that the statement in the deed of November, 1833, that the land beyond his north boundary was Company's land, taken in conjunction with the defendant's admission that Mr. Brown had not since acquired any land there, was conclusive evidence against his right to the piece of land in question. So, he urged that a request made by the defendant in 1849, that the land on that side might be described as partly Government land and partly grant 1,667, was a further, though more restricted admission fatal to the defendant. On the other hand, the defendant insisted that a plan which had been recently registered by the plaintiff and which had been drawn by himself, adopting the hedge as the boundary, was conclusive against his present claim. And I think, there were other representations of a similar kind which he contended should be similarly regarded. But what do they all amount to? Simply to statements of the opinions of the parties, entertained at different times upon what was more a matter of law than a matter of fact. Even, if they had been the plainest admissions of facts, it would have been open to the parties to explain them, and to shew that they were erroneous, unless, indeed, the party making them had, thereby induced his opponent to act upon them and change his position. *Heane v. Rogers*, 9 B. & C; *Pickard v. Sears*, 6 A. & E., *Gregg v. Wells*, 10 A. & E., but the question between the parties was a question of law. Whether the plaintiff was entitled to the land in dispute depended upon the legal effect of certain deeds: and both he and the defendant were at liberty to hazard as many erroneous opinions upon that point as they pleased, without affecting the question or prejudicing their rights, unless they induced the other side to act upon their admissions.

I agree with the defendant on one point, however, and that is, that the plaintiff has himself partly to blame for the dispute which has eventuated in this suit, if he had marked out his boundary, as he ought to have done, at the time of the purchase, the present difficulty would not have arisen. Being absent, however, and having left his property to the care of a gentleman not fully cognisant of his rights, he exposed the piece of land in question

to be considered as not belonging to him. Seeing a bamboo hedge which enclosed, with the other boundaries given in the deed of November, an area equal to that which the whole property was estimated in that deed, any surveyor would have been led to conclude that the hedge was really the boundary of the estate. It is clear on examining the deeds and the history of the purchase, that this was a mistake; but the mistake would not have occurred, if the true boundary had been defined; and once committed, it was but natural that its explanation should be rejected, or admitted at last only with reluctance. The plaintiff explained this neglect by stating that he believed that he had the Government and not Mr. Brown, for his neighbour; and this was evidently the belief of the parties in 1833. Still, I think, that the plaintiff ought, for his own security, to have marked out his boundary; and as his neglect to do so has contributed to the present difficulty, I do not think this is a case in which the successful partly is entitled to costs.

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Judgment for plaintiff.

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CHE HIM *v.* ROBERTSON & ANOR.

LEE KOU KOI *v.* ROBERTSON.

LEE KOU KOI *v.* MAHOMED HASSAN.

HASHIM *v.* ROBERTSON.

The several provisions in the Police Act XIII of 1856, Section 112, [a] afford no protection to police officers and others helping them, nor do they give them any right to a month's notice before action, or limit the party aggrieved to three months for bringing his action, except in cases, not only where the acts complained of are illegal, but where they were done *boni fide*, in honest ignorance, and conscientious belief that they were done in the discharge of duty, and were not done from caprice, or under a vague opinion of one's own powers.

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March 7.

These were actions for false imprisonment against certain officers of the Police Force. Each case arose out of circumstances distinct from the others, but as they were tried in succession, and judgment was delivered as a whole, they have been reported in this form. The facts giving rise to the cases, and questions raised therein, fully appear from the judgment.

[Mr. Wilson as Special Agent, for Plaintiffs in the several actions.]

The Defendants severally in person.

Cur. Adv. Vult.

March 21. *Maxwell, R.* At the late sittings, several actions for false imprisonment brought against police officers, were tried before me; and if I reserved my judgment in them all, it was not because I entertained much doubt about the real state of the facts or the merits of the cases, but because I wished to refresh my memory with a

(a) See now Ord. I. of 1872, Section 42, *et seq.*

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perusal of the numerous authorities which are scattered in the Reports, upon the only defences that were, with one exception, relied upon by the defendants, *viz.* lapse of time and no notice of action. The Police Act of the Legislative Council (XIII. of 1856, Sec. 112) enacts that actions which may lawfully be brought for "anything done, or intended to be done under the provisions of the "Act," must be brought within three months, and that a month's notice of action must be given to the defendants. In all the cases tried before me the cause of action accrued more than three months before the action was begun, and no notice of action was given to any of the defendants. It became therefore necessary to consider whether the acts complained of were "done or intended to be done under the provisions of the "Police Act." In point of fact, none of the defendants could indicate any provision in the Act under which they acted or intended to act; but this was not very material. If there are any provisions to which their acts can reasonably be referred, that is enough. In England we have a multitude of Acts which give similar protection, though not in precisely the same language. Those which come nearest to it are the Malicious Trespass Act [7 & 8 Geo. IV. c. 30, Sec. 41]; the Larceny Act (7 & 8 Geo. IV. c. 29, Sec. 75); the Highway Act (5 & 6 W. IV. c. 50 Sec. 109); and the County Courts' Act (9 & 10 Vict. c. 95, Sec. 139),—to say nothing of numerous local Acts,—which give the privileges of notice of action and of a restricted period of liability to all persons sued "for anything done "in pursuance of the act." Magistrates [24 Geo. II c. 44, and 11 & 12 Vict. c. 44] are protected to the same extent, if acting "in the "execution of their office;" and Custom-house officers (8 & 9 Vict. c. 87 Sec. 117) when acting "in the execution or by reason of their "offices." The protection given to Magistrates, indeed, under the words "in the execution of their office," in 11 & 12 Vict. c. 44 goes very far; for it has been held by the Court of Exchequer that a Magistrate who has acted maliciously and without reasonable or probable cause, is entitled to notice, if he acted *within* his jurisdiction; *Kirby v. Simpson*, 10 Exch. R. 358 S. C. 23 L. J. M. C. 165. But where a Magistrate *exceeds* his jurisdiction; then he is not entitled to protection except under the same circumstances as other persons who are protected for "anything done in pursuance" of the Act which gives them the protection. These words "done "in pursuance of the Act," which come nearer to those of the Police Act than those in the Magistrates' Act, it is obvious, "do not "mean," as Parke B. observes in *Hughes v. Buckland*, 15 M. & W. 355, "acts done in *strict* pursuance of the Act, because, in such a case, a party would be acting legally, and would not require protection. The words, therefore, must be qualified by the decisions; "and then the meaning will be, that a party, to be entitled to protection, must *bond fide* and reasonably believe himself to be "authorised by the Act." The reasonableness of the belief is, however, but a test of its *bond fides* [per Lord Cranworth in *Horn v. Thornborough*, 3 Exch. 850]; and the rule therefore is perhaps more accurately laid down by the Court of Common Pleas in *Booth v. Clive*, 10 C. B. 827, S. C. 2 L. M. & P. 253, that the pro-

tection depends on whether the defendant acted in the honest belief that his duty called upon him to do the act complained of. In that case, an action against the County Court Judge for trying a cause after having been served with a writ of prohibition, Jervis C. J. told the Jury that if the defendant had acted in the *bonâ fide* belief that his duty made it incumbent on him to do so, he was protected; and that as to the reasonableness of his belief, if it meant anything more than in good faith, it meant, according to his reason, as contradistinguished from caprice. In one of the latest cases on the subject, *Arnold v. Hamel*, 9 Exch. 406; S. C. 23 L. J. Exch. 137, an action against an officer of customs, Parke, B. says: "the question will be for the Judge to determine whether the defendant acted honestly believing that his duty called upon him to do what he did. Of course the reasonableness of the belief would be an element in deciding as to the *bonâ fides*;" and he refers to *Booth v. Clive*. Alderson, B. adds: "The real question is, whether the officer was acting in honest ignorance and conscientious belief that he was acting in the discharge of his duties." "But again, that 'conscientious belief' must be, according to the Court of Q. B., not merely that vague opinion of his own power, but a reasonable conviction that he was enforcing the specific provisions of the law in committing the grievance complained off," *Kine v. Evershed*, 10 Q. B. 143, 151. "The principle seems to be this," says Lord Denham C. J. in delivering judgment in *Hazeldine v. Grove*, 3 Q. B. 997, "that when the Magistrate with some colour of reason, and *bonâ fide*, believes that he is acting in pursuance of his lawful authority, he is entitled to protection, although he may proceed illegally, or exceed his jurisdiction." So, Lord Tenterden says in *Beechey v. Sides*, 9 B. & C. 808, that the intention of these provisions is "to protect persons acting illegally "but in supposed pursuance of the statute, and with a *bonâ fide* intention of discharging their duty under the Act of Parliament." Thus a constable or a county court bailiff who, under a warrant to take the goods of A., by mistake takes those of B. is protected. *Parton v. Williams*, 3 B. & A. 330; *Barling v. Harley*, 27 L. J. Exch. 258. In the latter case, indeed, Martin B. dissented from the rest of the Court. There, however, the defendant acted under legal authority, but committed an honest error in executing his duty. On the other hand, a constable who was authorised by a local act to remove from the streets animals exhibited there, having removed from a stable, which he was not entitled to do, an animal which had been so exhibited, he was held not entitled to notice of action when sued for having imprisoned a person who had attempted to prevent him. *Cook v. Leonard*, 6 B. and C. 341. In this case he had no authority whatever from the law for his act, nor any reasonable ground for supposing he had. In *Wedge v. Berkeley*, 6 A. & E. 663, a Magistrate seized certain goods on a suspicion of felony, but without having any reasonable ground for his suspicion; and it was held that whether he was entitled or not to notice of action depended on whether he proceeded under a *bonâ fide* belief that he was executing his duty. "The distinction is clear," says Coleridge, J. "between that which amounts to

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"a defence, and that which entitles to notice. The Magistrate is entitled to notice when he has no defence on the merits, but where in a matter within his jurisdiction, he has exceeded its limits, *acting, nevertheless, bonâ fide*, p. 669. In short, the decisions of the Courts and the dicta of the judges, seem in the main to have established the law on this subject in the spirit of the preamble of the 24 Geo. II. c. 44, which recites that as justices are discouraged in the execution of their office by vexatious actions for small and involuntary errors, it is necessary to render them safe in the execution of their office, so far as is consistent with justice and the liberty of the subject; but necessary also that the subject should be protected from wilful and oppressive abuse of the laws committed to the care and execution of justices. For honest errors, there is protection; for wilful and oppressive abuse in excess of their jurisdiction, none." The plaintiff, then, in the present cases, cannot succeed, unless not only the defendants acted illegally, but their acts were not done in the honest belief that they were doing their duty. Such being the law applicable to these cases, I now proceed to examine the facts in each of them.

In *Che Him v. Robertson, Ward and Scott*, it appeared that a burglary was committed early in the morning of the 11th of August, at Teluk Ayer Tawar, in the house of a Chinese pawnbroker named Que Chuan; and that the plaintiff was apprehended by the 1st defendant, the Deputy Commissioner of Police, on the 27th August, on the charge of being implicated in the crime. The defendant is a Justice of the Peace, and had authority to make this arrest. Nor have I any reason to doubt his *bonâ fides* in making it; but at the same time I must say that when I bear in mind that the information against the plaintiff was given, for the first time eleven days after the burglary, by the pawnbroker, who admitted at the trial that the plaintiff had come and smoked in his house at daybreak on the morning of the robbery, had come again on the evening of the following day, and had been seen by him a third time on the day after, in the next house;—when I bear in mind that the plaintiff had been known to this pawnbroker from his childhood, that he had been, until the last two years, an inhabitant of Teluk Ayer Tawar, and during these two years a frequent visitor at his mother's house there, that he was connected with some of the chief inhabitants of the place, and that he continued in the village for eight days after the burglary, assisting the police, with other Malays, in anticipation of another similar outrage, and actually passing some of his time at the police station;—and when I bear in mind, also, the uneasy, downcast, nervous demeanour of that pawnbroker in the witness box, I cannot divest my mind of strong suspicion that the charge against the plaintiff was not an honest charge, but was made against him with some sinister object. But this is not material as far as Mr. Robertson is concerned. The pawnbroker, though silent on the previous repeated visits of the Inspector Jeremiah and other policemen, informed Mr. Robertson, on the 11th day after the burglary, that he had seen the plaintiff among the burglars on the night of the burglary, carrying a gun, and had heard him direct

them to the shop ; and Mr. Robertson, as he lawfully might, as a Justice of the Peace, apprehended him in person. I pass over the circumstances attending the arrest, and the means by which the plaintiff was got to the defendant's house, remarking only that the fact of his going boldly to the Deputy Commissioner as soon as he heard of his wife's apprehension, shews that he was not keeping out of the way,—that he did not act like a man conscious of guilt ; and this strengthens my suspicions as to the character of the charge against him.

The plaintiff's complaint, however, is, that after his arrest he was kept in confinement for an unreasonable length of time, to wit, from the 27th of August to the 13th of September, without having been taken before a Magistrate for examination, and that during all that time he was treated with wilful and unnecessary cruelty by the defendants, in this respect, that he was kept handcuffed all the time, except when at meals, washing and calls of nature. In the present case, the defendant's duty was, under section 6 of the Police Act, to detain the plaintiff "in order to his being brought before the Police Magistrate." But was it necessary to keep him imprisoned for 17 days without taking him before the Magistrate ? Even if the defendant had been the Police Magistrate, he would not have been justified in detaining him there. It is well settled that a commitment for an unreasonable time is wholly void ; and trespass lies against the Magistrate who makes it, even though he acted from no improper motive. "The duty of a Magistrate is to commit for a reasonable time, and if he commits for an unreasonable time, he thereby does that which he is not by law authorised to do, and the commitment is void from the beginning, *per Cur.* in *Davis v. Capper*, 10 B. & C. 28, 38. So utterly void and illegal, indeed, is it, that a person aiding another so committed to escape, is not guilty of any offence against the law ; *R. v. Gooding*, cited in *Davis v. Capper*, *ubi sup.* In the present case, there was not the slightest ground for regarding a preliminary imprisonment of 17 days for such a purpose necessary or reasonable. Mr. Robertson pleaded his own engagements ; but even if the excuse had been valid in point of law, it was not established in point of fact. He says that on the 29th, or it might have been the 30th or 31st of August, he went to Quedah. But he did not shew why the plaintiff was not taken before the Magistrate on the 27th, or the 28th, or the 29th, or the 30th ; and I can see no good reason for the neglect. The pawnbroker, who was the prosecutor, lived not far off, and could have been brought forward at any time, in two or three hours. But suppose there was some reason for the first delay, why was the plaintiff not taken before the Magistrate when Mr. Robertson returned from Quedah ? The defendant says he was too busy in preparing for some expedition to Perak ; but he is contradicted by one of the Inspectors, Thompson, who proved in the clearest manner that on the 8th September, he, Robertson, was at his office and engaged in his ordinary duties. Mr. Robertson disputed the accuracy of this witness, but a note which the latter produced written by Mr. Robertson on the 6th of September directing him to come to town for his pay, put the

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matter, in my opinion, beyond question. It shewed, also, that Robertson was probably on the spot on the 6th and 7th as well as on the 8th. It is established, then, that he arrested the plaintiff, and had him kept locked up by a man under his orders. It is in evidence that he saw him on more than one occasion during his confinement, and was in Penang attending to his duties in the ordinary way for days, and it is admitted that he neither took him nor directed him to be taken before a Magistrate for examination on any day between the 27th August and 13th September, while not the slightest excuse is shewn for this gross neglect. Even while asserting his own engagements as an excuse for his neglect, Robertson does not shew how those engagements could in any way interfere with the man's examination. Beyond the fact of his having arrested the plaintiff, it does not appear that he had any evidence to give in the case against him; and there is nothing to shew that the Magistrate's inquiry might not have been gone into and even completed without the defendant's presence. I am of opinion, therefore, that this imprisonment was illegal, and absolutely void *ab initio*.

This alone however, as I said before, does not entitle the plaintiff to a verdict; for if the defendants did the illegal act in honest ignorance, and in the conscientious belief that they were acting in the discharge of their duty;—if, in the language of Coleridge, J. in *Wedge v. Berkeley*, while exceeding the limits of their jurisdiction, they nevertheless acted *bona fide*, the action must fail on account of the lapse of time and the want of notice of action. Now there are two or three facts in the case, which seem to me to dispose of this question. We have the fact that the first defendant is and has been for some time the Deputy Commissioner of Police, and the others are Inspectors; and it is impossible for me to believe that they did not know that it was their duty to take the plaintiff to a Magistrate for examination without loss of time. They cannot have been ignorant of so elementary a rule as this—a rule not of law merely, but one laid down for their guidance in the Police Regulations. Indeed, they asserted in the course of the trial, that they habitually observed that rule; and this disposes of all doubt as to their ignorance,—even if ignorance, on such a point, in such men, could have been “honest ignorance.” They said, however, that the case was an exceptional one, as the plaintiff and his fellow prisoners, though confined in the Island lock-up, were in custody for an offence committed in the Province; that for this reason no charge was entered against them in the charge sheet of the station where they were confined; and Scott said that it was because he had no evidence that they were not taken before a Magistrate. I should have some difficulty in believing that the Inspector in charge of the lock-up could have honestly blundered into the notion that because his prisoners came from the Province, he was discharged from all his ordinary duties of a constable as respected them, and that he was at liberty to keep them incarcerated as long as he or his superior officer pleased, or until somebody brought him evidence against them. Still more difficult should I find it, to

believe that the Deputy Commissioner, also, was so ignorant of his duty, as honestly to consider himself entitled to keep the plaintiff locked up for such a long period without any adequate motive, before taking them to a Magistrate for examination. But there are other facts in the case which I cannot attribute to any amount of ignorance or stupidity, and which throw such a light on the conduct of the first defendant as to bring me to the conclusion that he acted in no conscientious belief that he was doing his duty, but, on the contrary, in a spirit wholly alien to a due discharge of that duty. I pass over the total neglect of legal forms in the arrest and detention of the plaintiff and come to the manner of his detention. The man was immediately handcuffed. On the following day the defendant Robertson saw him in that condition, and left him in it. Some ten days after, finding that he had been relieved of his handcuffs by an Inspector, he, Robertson, immediately ordered that a pair should be put upon him, and thus the man continued until the 13th of September, when he was taken to the Province. Now, this conduct was not mere negligence or oversight. It was a positive act of harshness, which if not necessary, betrayed a spirit of cruelty and tyranny. It has not been alleged that the man was violent or insubordinate, or had attempted to escape, nor is there any ground for believing that handcuffing was necessary to prevent his escape. Upon the trial of another action, some months ago, I was led by the defendant Robertson and one of the Police Inspectors, to believe that it was necessary to handcuff prisoners in the lock-up to ensure their safe custody. Though not convinced on an inspection of the place that escape was so very easy, I felt great difficulty in opposing my judgment upon such a question to that of Police officers, and still greater difficulty in bringing myself to believe that Englishmen would inflict unnecessary suffering on any human being, however degraded or depraved. I therefore at once accepted their representations without further testing their accuracy. On the present occasion, however, I have thought it necessary to apply a test to it; and that test, it seems to me, proves conclusively that those representations were far from accurate in the opinion of the very persons who made them. Awang, one of the prisoners who was treated in the same way as the plaintiff, mentioned, in the course of his evidence, that only three men were handcuffed in the lock-up—the plaintiff, himself and one Slaman—but that during the whole time that he remained there—till the 13th September, though numbers of prisoners were daily brought in, not one of them was ever handcuffed. And the defendants themselves admitted that except in the case of this burglary, prisoners have never been handcuffed in the lock-ups. What then becomes of the alleged necessity of handcuffing the plaintiff? The defendants themselves have proved by their own practice in other cases, that it was not necessary for the purpose of preventing their escape. If so, then to what am I to attribute this treatment of the plaintiff for such a length of time? To what *can* it possibly be attributed, but to a spirit of oppression. The act was barbarous and unnecessary—as barbarous and un-

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necessary as flogging, starving or any other corporal suffering would have been; and I can regard it therefore only as a wilful abuse of power; something wholly different from an honest and conscientious discharge of duty by an English Justice of the Peace or Constable. If I were to judge of the spirit which influenced the defendant Robertson's conduct towards the plaintiff, by his treatment of others of the prisoners, I should find strong corroboration of the opinion I have formed of it; but I forbear from referring more particularly to that part of the evidence which bears on this subject. If I were trying this case with a jury, the question which I should leave to them would be, whether, as Alderson B. puts it, the defendant acted in honest ignorance and conscientious belief that he was acting in the discharge of his duties,—whether, in the language of Jervis, C. J. he acted as he did in the *bona fide* belief that his duty made it incumbent upon him, whether he acted according to his reason as contradistinguished from caprice or worse;—and as I have to fulfil the functions of a jury here, I answer the question by saying that the defendant did not, in my opinion, act in the honest belief that he was doing as his duty made it incumbent on him to do, and that he acted, not according to his honest reason, but according to his caprice. I am therefore of opinion that the act complained of was not “anything done, or intended to be done under the provisions of the Police Act,” and that the first defendant was not entitled to notice of action, nor was the plaintiff limited to three months for bringing the action. With respect to Scott, also, I think he is liable, for in my opinion he cannot have been ignorant of his duty, or insensible of the useless cruelty of keeping the man for more than a fortnight in irons; and if he chose to keep the plaintiff in that state for that length of time, not because he honestly thought it lawful and right, but in obedience to the illegal order of his superior, he must suffer the consequences. I said at the trial that the evidence did not satisfy me as to Ward's participation. The verdict will therefore be for the second, and against the 1st and 3rd defendants with 200 dollars damages.

In the case of *Che Him v. Robertson and Jeremiah*, the same plaintiff sued the defendants for his subsequent imprisonment in the Province lock-up, from the 13th to the 17th of September. I entertained some doubt at the trial about Robertson's liability in this action, and upon the whole I am inclined to think he is not legally liable. He sent the men over to the Province in charge of the other defendant, Jeremiah, to whom he gave instructions to ascertain from the Magistrate when he would hear the case. I do not think this order was very wise, since if the Magistrate chose to name an unreasonable distant time, the constable who undertook to keep the men in custody in the meanwhile, without commitment or even verbal remand would have exposed himself to an action. But this order of the Deputy Commissioner did not exonerate the defendant Jeremiah from the duty—and indeed was not inconsistent with it—of taking the prisoners at once before the Magistrate, and leaving to him the responsibility of a remand and further

confinement. Jeremiah says he called on Monday, the 13th, upon the Magistrate who put off the examination to Friday, the 17th; but assuming that the imprisonment in the interval was, in respect of its duration, legal, I think that Jeremiah is liable for the shameful treatment to which the plaintiff was subjected during that time. When the plaintiff was removed from the Island Office, instead of being handcuffed separately, he was handcuffed by Jeremiah to Awang, the left hand of one man being coupled to the right of another. The other prisoners were similarly treated. Mr. Robertson saw them in this condition as they proceeded from the station to the waterside, and the precaution may have been desirable in marching the prisoners from one place to another. There is no evidence, however, that he either ordered that the men should be kept in that condition in their new prison, or that he knew that they were so kept. On their arrival, at the Police Office of the Province, Jeremiah put them into the lock-up, as they were, fastened in couples. The constable in charge was one Pledger, who was under Jeremiah's orders. The plaintiff appealed to Jeremiah to unfasten Awang, his companion, from him, and to handcuff both his hands instead, in order, as he said, that he might at least sleep with a little more comfort. Not only, therefore were the men taken by Jeremiah to the lock-up in this state, but his attention was called to the cruelty to which they were subjected. His answer to the plaintiff was a refusal. "There are no more handcuffs; I know nothing about it;" was his only reply; and the plaintiff was left fastened to Awang from Monday afternoon till Friday morning. He was not released for meals or even for any other necessary purpose. "We were obliged," says Awang, "to help each other, for we could not help ourselves, to water when we went, &c." I need not stop to enquire whether this lock-up was as safe as it ought to have been. Assuming that the windows were as insecure as they were represented by Mr. Robertson, and that there was a tradition of a prisoner having once dug his way off out of the room through the floor, I have his own word and Jeremiah's that they had never known prisoners handcuffed in that lock-up before; and even if the number of men then imprisoned was unusually great, as suggested by Jeremiah, there was no excuse for the disgusting and disgraceful treatment to which the plaintiff was subjected. Such treatment appears to me to have been wholly illegal, and consequently that the plaintiff acquired thereby a good cause of action. I think, also, that it was a sheer act of gratuitous cruelty and that the defendant Jeremiah did not act in honest ignorance or in a conscientious belief that it was his duty—that he did not act according to his reason, but according to his caprice. I am of opinion therefore that the act complained of was not "done or intended to be done under the provisions of the Police Act," and I therefore give judgment against him for 150 dollars damages. As respect the other defendant, Robertson, the verdict will be entered for him. /

The next actions which I have to consider were brought by a Chinaman named *Lee Kou Koi*, one against *Robertson* the other against *Mahomed Hassan*, a Jemadar of Police; and I shall take

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them together. According to Mr. Robertson's account, a woman named Cheah Ah Neogh came to him one day, alone and exhausted, and complained that her husband the plaintiff, had, two days before, beaten her, turned her out of house and home, and taken from her her child which was then at the breast; that she had no desire, and was afraid to make a formal complaint against him for the assault, but begged that he, the defendant Robertson would *send for him and talk to him*. On hearing this tale, and being desirous to assist her, he directed Mahomed Hassan to go with the woman and *try and persuade* the man to come and see him. His account before the Magistrate was more brief. The woman, he said, had complained to him of the assault, &c, and had said she did not wish her husband punished, but asked him to send for her husband to tell him not to do so any more; upon which he had desired the Jemadar to accompany the woman and *ask her husband to come and speak to him*. Now, here, at the outset, we have an assumption of authority which does not belong to any Police Officer. If the woman claimed the child, it was for the Supreme Court, not for a Deputy Commissioner of Police to pronounce upon her claim. If she merely wished the defendant's private good offices to settle a domestic broil between herself and her husband, he had no business to dispatch a public officer, upon such a private errand. But neither her tale, nor her state of solitude and exhaustion, authorised the defendant to send a policeman to *try and persuade* the Chinaman to *come and speak* to him. It strikes me, indeed, that the object of the policeman's mission was rather to get the child than to summon the husband for a lecture on the duties of married life from the Deputy Commissioner. Mahomed Hassan says as much. He says that his instructions were to call the husband and *to tell him to bring the child*—a species of verbal order of *habeas corpus*, returnable *instantly*, before the Deputy Commissioner, in short. He went first to the plaintiff's house; and finding that he was not at home, proceeded to that of his tribesman where the child was. The plaintiff was not there either; and it seems to me that if the policeman, wanted the father and not the child, he would have left this place, too, and gone in quest of him. Instead of doing so, he remained, and in the course of ten minutes, the plaintiff, who had been sent for from the market, arrived. The Jemadar says that upon the plaintiff's approaching the house, at the door of which the Jemadar was standing, the plaintiff, who had never seen him in his life before, without saying a word to him, straightway dealt him a blow with a long umbrella which he carried; and then, with the assistance of other men, gave him fresh blows, seized him and dragged him the whole way from the house, at Ujong Passir to the Police Office. The preposterous absurdity of this statement needs no comment; and I have no hesitation in expressing my utter disbelief that any Chinaman would not only make a wanton and unprovoked attack upon a policeman, but having done so, would, instead of running away, drag the man, getting, too, a number of his countrymen to assist him, to, of all places in the world, the Police Office, where he must have known that a Magistrate sits and In-

spectors and peons are at hand. The falsehood of this account is palpable enough, without noticing the entire absence of evidence as to marks of violence, &c. The plaintiff's story comes to my mind, much nearer the truth. On arriving at the house where he had left his child, he saw his wife sitting in a palanquin a short way off, and found Mahomed Hassan in the house. "I said to him," he says "why do you come here? He said: "Tuan Bahru [some Malay nick name for the Deputy Commissioner] directed me to come and take the child;" and in cross examination he added that the Jemadar stretched out his arms to take his child, but that he, the plaintiff, would not let him. "I said, what fault has my child committed; have you a warrant? He answered, No. Then, I said, you cannot take my child. If you wish, you can take me. He said very well; and seizing me by the hand, he pulled me along." He then goes on to state that after proceeding half way, he remonstrated with the policeman at being thus dragged, whereupon the policeman let him go, and that then, turning the tables upon his antagonist, he seized him, and, with the assistance of three or four passers-by, his countrymen, dragged him towards the Police Office. Now, the policeman, according to this far more probable version of the facts, committed an assault on the plaintiff; and unless the Police uniform is to entitle every body who wears it, to notice of action under the 112th sec. of the Police Act, it is impossible to say that Mahomed Hassan is sued for "anything done or intended to be done under the provisions of that Act." He was sent on an errand wholly foreign to his duties as a policeman or constable. He had no summons to serve, no warrant to execute. The direction to tell the man to come to the defendant Robertson and to bring the child, was a mere piece of impertinence, and improper as it was on the part of Robertson to send him upon such a message, I do not think that he had any order from him to arrest the plaintiff. The policeman shewed on his conduct, in letting the plaintiff go, that he was conscious that he had exceeded his instructions in apprehending him.

Upon arriving at the office a riot took place. Into the merits of this part of the case, however, it is not necessary to go. The Chinaman says that he and his companions had marched the policeman to the Station for the purpose of laying a complaint against him; but that on his approaching the place, the defendant Mahomed Hassan disengaged himself by an effort, that eight or ten peons ran down the steps of the porch, and proceeded to beat the Chinese; that the defendant Robertson coming out of his office at the time, was called to by the plaintiff for protection; but that without listening, he immediately ordered the five men to be apprehended and locked up. Mr. Robertson on the other hand describes the matter in a more serious light. According to him, the five Chinese who held the Jemadar prisoner, were preceded and followed by a large mob of Chinese and Klings, which made a rush on himself and the rest of the police, in the course of which one, Pierce, was knocked down, and the defendant knocked up against a pillar. If this be so, it is singular that the five

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Chinese who brought the policeman were the only men arrested, and that none of the mob were apprehended. I am rather disposed to believe that Thompson's account of the scene, is more accurate. He describes the crowd as consisting, not of combatants, but of the idlers who were hanging about the Magistrate's Court, and who, on seeing the strange sight of a policeman a prisoner in the hands of five Chinamen, flocked out of the Court, not to assist, but to look on. I confess I do not believe in the story of five Chinamen marching to the Police Office and making a deliberate onslaught on two or three times their number of officers, European and Malay; and I think that Mr. Robertson would have exercised his office with more temper and discretion if, instead of arresting and locking up for several hours these five men, he had calmly inquired into the circumstances which had brought them to the Police Office. So unusual a sight ought surely to have led him to enquire into its cause, instead of at once assuming that the men who had seized the policeman, must be in the wrong. It might have been that he had committed a felony, for aught he knew, however, I think the defendant was acting within his jurisdiction. The Chinaman had no right to seize the policeman as he did. He ought to have taken his number instead of assaulting him. Mr. Robertson's act was, in my opinion, neither judicious nor perhaps very well meaning, but I think it was done "under the provisions of the act," and that he ought to have had notice of action. In the action against Hassan, then, there will be a verdict for the plaintiff, with 25 dollars damages and costs. In that against the Deputy Commissioner a verdict for the defendant.

I now come to the last action, *Hashim v. Robertson*. This is another case in which the whole mischief has arisen from the defendant's assumption of powers which he does not possess,—an assumption which, indeed, would be merely ridiculous, if those over whom the usurped authority was exercised were aware of the true limits of his power, and of their own rights; but which, in their present ignorance, leads sometimes to consequences, which are not ridiculous. The leading facts of the case are these: a woman named Pah came to the defendant, and informed him that another woman named Minah, had been forced by the plaintiff to prostitute herself, that she had been sold by him to another man, and that he had taken her property from her. The defendant says he desired Subadar Amir to go with Pah and *make inquiry—to see where the girl was, and ascertain if she was detained against her will, or her things had been sold. He left the matter entirely to his judgment.* If so, we have a curious example of the manner in which Police Subadars exercise their judgment in Penang. He went, at about 6 P.M., to the plaintiff and to another man named Mahomed Salleh. What he said to them was not evidence against the defendant, and was therefore not stated; but both of the men found their way forthwith to the Police Office and were locked up for the night. The defendant positively denies that he ever ordered the Subadar to arrest the plaintiff; but when I find, as was proved by Nagore Mira, and not positively denied by defen-

dant, that on the same evening at about 8.30 o'clock, the defendant was informed of the arrest, and that he refused to release the plaintiff except on better bail than was tendered to him; and when I find him, according to his own admission, having the plaintiff brought into his room with some others, merely on the following day, and trying to frame some charge against him, I must say that notwithstanding his assertion to the contrary, I can come to no other conclusion from the facts than that he *did* order the plaintiff's arrest. I do not think that a Subadar would have ventured *ex mero motu* to apprehend two men on the defendant's order to *inquire* and if the defendant had not given the order, I think he would have explained to the policeman the absolute illegality of his proceeding, and rectified his grave error at once by liberating the plaintiff. But he did nothing of the kind. The plaintiff says that the day after his having been taken into custody, he was conducted by a peon to the defendant who asked him if it was true that he had taken Minah to Syed Mahomed to borrow money; and upon the plaintiff saying that he had, as she owed him 40 dollars, the defendant ordered the Jemadar to take him away and *lock him up*. The defendant does not deny that he gave this order. The plaintiff went on to speak of subsequent interviews of the same kind, but I did not believe him. We have, however, the plaintiff arresting, as I think his conduct proves, and then keeping in confinement for some 36 hours, a man charged with he hardly knew what, according to his own account;—for if that account be correct, it was not until the 16th, the day after the plaintiff's arrest, that he, the defendant, framed the charge which now stands in the Magistrate's book against the plaintiff, of detaining a woman against the will of her lawful guardian for the purpose of prostitution, which is made a misdemeanour by the 44th Section of the Police Act. This was the substance though not the exact language of the charge. The same charge, however, stands in the same words in the Inspector's charge-sheet under date of July 15; but the defendant suggested that the officer copied the entry from the Magistrate's book—that is, in other words, locked up the man for the night without any charge being made against him. This version of the facts, indeed, does not improve the defendant's case. It would shew that he had the plaintiff arrested first, and then endeavoured to find out why. I should be slow, however, to accept, without further evidence, this theory either of the defendant's harshness or of the Inspector's neglect; and from the curious language of the charge, I am inclined to think that the Inspector did his duty, and that the defendant was not engaged on the 16th in forming a charge, as he says, but in questioning his prisoners, as to their guilt—a course which I have never heard commended in England, but have sometimes heard severely reprehended from the Bench. Now, the plaintiff's imprisonment was wholly illegal. A Justice of the Peace may apprehend without warrant for felony or breach of the peace; but for a misdemeanour without, violence, no person can be apprehended without a warrant. And even to issue a warrant in the first instance, instead of a summons, except in cases of great aggravation, or where there are

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grounds for believing that the party is about to abscond, is a very harsh and improper measure. This case, then, resembles *Leonard v. Cook*. The defendant's act was not the erroneous exercise of a power vested in him, but the assumption of a power which he had not, and could not reasonably conceive that he had. It is impossible to say that such an act was "done or intended to be done" under the provisions of the Act," and therefore the defendant is liable, notwithstanding that more than 3 months have elapsed, and he has had no notice of action. In considering the question of damages I am not unmindful of the worthlessness of the plaintiff. It appeared pretty clearly, in the course of the case, that he was a disgusting wretch who lived upon the wages of a poor girl's prostitution. But the question is not whether the plaintiff is a wretch, but whether the defendant has not acted tyrannically and oppressively towards him; and though I cannot give him heavy damages, I must make them sufficient to mark in some degree my sense of the impropriety of the defendant's conduct. The verdict will be for the plaintiff, with 50 dollars damages. ✓

I must not dismiss this case, however, without noticing an act of illegality on the part of the defendant which was elicited in the course of the trial. A man of the name of Shella Merican, who gave evidence, stated that he had also been a witness when the plaintiff was tried by the Magistrate; and in answer to the question where he had passed his time for the four or five days—from Friday to Wednesday—that the case was under the Magistrate's consideration, he said that he had been kept in the guard room of the Police, and that though he had offered bail, the defendant had refused to accept it. He said, also, that though the Police Magistrate told him on the Tuesday that he might go home, he was marched back by a policeman to the guard room, and kept a prisoner there till the following day. Here then, I come upon a practice which is new to me, but which I shall forbear, at present, from characterising as it deserves. If a witness obstinately refuses to bind himself to appear at a criminal trial, the Magistrate may lawfully commit him till he give sureties. But here was a witness who had shewn no indisposition to attend, who even offered bail for his attendance; and yet he was kept a close prisoner. I never heard of anything to equal this, and I can only say it is fortunate the man did not bring an action for his imprisonment.

In assessing the damages in these actions, I have desired to make them as moderate as they could well be. And I have done so for two reasons: first, because the actions were brought late in the day; and persons who have grievances should not let them sleep for a length of time before complaining; and secondly, because I cannot help fearing that the officers of Police of this place have been too long left without having the full sense of responsibility brought home to them, and usage is some mitigation for wrongful acts, even whenever so wrongful. The Police appear to be left entirely uncontrolled by their chief. It was with great regret that I heard Mr. Lewis, the Commissioner of Police, say in his evidence in the case of *Che Him v. Robertson*, that

though the wife and mother of the plaintiff had petitioned him on the subject of Che Him's imprisonment, he had not interfered, and that he had told them he never interfered in such matters. Why not? It was his duty to interfere; and the Commissioner of Police never made a greater mistake in his life than in imagining that by declining to execute the duties of his office, he relieved himself from its responsibilities. As great responsibility attaches to nonfeasance as to misfeasance, and Mr. Lewis should know that those who stand by, and permit which it is in their power to prevent or to terminate, are responsible for them. If the Commissioner had interposed his authority between his Deputy and the plaintiff, as I think he ought to have done, the latter and many other innocent men would have been saved much suffering, and the former the present action. I trust that I shall not have many more such actions as these to try; but if the Police authorities or the local Government will not interfere to prevent or punish the illegal acts and the excesses of Police Officers, the people of this place may, at all events, rest assured that they will always find redress for such conduct in Her Majesty's Supreme Court.

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and
WAN ISMAIL. [a]

A Foreign Sovereign cannot be sued in the Courts of this Colony, simply because he happens to be a natural born British Subject according to our own law, if he has not acted, or done anything by which it might be inferred that he acted as a subject.

In a suit against such an individual, it is not necessary to aver in the bill or declaration, that he is subject to the jurisdiction of the Court. This is a matter that should come from him, and if in his plea he does not say he is exempt from the jurisdiction, it must be presumed that he is not so exempted.

Query. Whether a person, after he has been once recognised by the British Crown, as an independent Sovereign, can thereafter be considered a subject of that Crown?

Bill for partnership accounts. The second defendant filed an answer. The first defendant pleaded in bar, as follows:—

"The plea of Sultan Ahmed Tajudin Mokaram Shah bin Sultan Zain al Rashid, who has been erroneously sued by the name of Ahmed Tajudin bin Sultan Zain Noor Rashid and by the description of Governor or Ruler of Quedah, to the petition of Lawrence Nairne, plaintiff.

"This defendant by protestation not confessing all or any of the matters or things in and by the said petition set forth and alleged to be true, for plea to the whole of the said petition, in so far as the same doth concern this defendant, saith that this defendant before and at the time of the commencement of this suit was, and still is, a sovereign prince, that is to say, the reign-

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[a] See *Ismahel Lazamana v. East India Co.* and *In re Trebeck*, ante p. 4.—also see *R. v. Tunkoo Mahomed Saad & ors.*, Criminal Rulings, Vol. II. of these Reports, p. 18

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"ing sovereign of the kingdom of Quedah, a state tributary to the kingdom of Siam, and that by reason of the premises he ought not to be compelled, against his will, to answer to the said petition in this honorable Court, or to any suit or action in respect of the matters in the said petition mentioned, before any Judge or in any Court whatsoever. Therefore this defendant doth plead his said sovereignty in bar to the plaintiff's petition, in so far as the same concerns this defendant, and prays the judgment of this honorable Court whether he should be compelled to make any further answer thereto."

The case was heard on the 25th, 27th February, and again on this day.

Plaintiff [in person]. The plea alleges that the defendant whose real and proper name and style is "Sultan Ahmed Tajudin Mokaram Shah bin Sultan Zain al Rashid," was before, and at the commencing of this suit and at the time of pleading such plea a sovereign prince, namely the reigning sovereign of the kingdom of Quedah, a state tributary to the kingdom of Siam—and that in consequence, this Court has no jurisdiction against him. I shall call this defendant by way of distinction from the other defendant, "Rajah of Quedah," by which name he is generally called. The Court has not now to consider and decide whether the Rajah is such a sovereign prince as he claims himself to be, for it is not the *truth* of the plea which is now in question but its *validity*.

For this purpose, as the Rajah has not supported his plea by any answer on oath contradicting any part of the bill, the bill must be taken to be true, except in the statement of such facts of which the Court will take judicial notice which may have been erroneously stated in the bill.

The case in the bill against the Rajah, so far as it is necessary to be now noticed, is as follows:—

That the plaintiff during the partnership transactions in the bill mentioned carried on a merchant's business in this Island, that the Rajah was born on this Island and resided here, but was at the commencement of this suit residing in Quedah, that he was the virtual owner of the British barque *Gratitude*, that she was purchased in the name of the other defendant, that the Rajah proposed to the plaintiff to take the entire management of her and employ her in trade, for which purpose the Rajah ordered the other defendant, who was the nominal but at the same time appeared on the bill of sale as the apparent owner, handed her over to the plaintiff, and then he refers to the particulars of the dealings with the vessel by the plaintiff and the trade carried on by him with and by means of her in co-partnership with the Rajah.

The bill virtually and in effect makes the Rajah a British subject because he was born on British ground; and by his pleading himself to have since become a sovereign prince, two points arise for the consideration of the Court.

First,—Whether the Rajah who was born in this Island and thereby *primâ facie* became a subject of the British Crown and is under the jurisdiction of this Court, can have become wholly

exempted from such jurisdiction by having since been created an independent sovereign.

Secondly,—If he is not wholly exempted from the jurisdiction but is subject thereto with regard to certain matters, then, whether the bill discloses that the subject matter of it makes out a case in which a person filling the two characters of Sovereign and Subject, is liable to be sued as such subject.

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As to the first point it was laid down in Calvin's Case—[7 Reports, p. 10 and p. 31—and see 2nd Vol. Stephen's Commentaries, p. 413] that a natural subject is one who is born within the dominions of the British Crown, whether within the United Kingdom or the territories thereto belonging, of parents who are either natural born subjects or aliens and foreign born, or, as Stephen has it, stranger-born, provided the alien parents were not at the time of birth in enmity with the sovereign of the birth-place. There are two other exceptions to this general rule. One is that the children of the sovereign and the heirs of the crown, wherever born, are held to be natural born subjects, and the other with respect to the children of ambassadors. But with these three exceptions the common law holds all persons born within the dominion to be natural born subjects, and therefore a person, *prima facie* so born, will be held to be a natural born subject, the law presuming for the general rule and not for the exceptional case, which, if any, must be pleaded—and here the Rajah has not put in any answer denying the statement of his birth—which is in the bill, or pleading any facts which would make out an exceptional case for him. The Court will take judicial notice of the sovereignty of the Rajah, which is admitted for the purpose of this argument, and perhaps when he came to the throne, but it will not take judicial notice of the date of his birth or where that happened and whether or not the Rajah was then the son of a sovereign or of any other facts which would take away the effect of his birth from the general rule I allude to; and even if the Court did, before it would do so, the facts either affirmatively or negatively in assertion or contradiction of the real facts, must appear somewhere on the face of the pleadings, for it is not for the Court to take the trouble of searching out for the benefit of a suitor and bringing to light every fact of which it will take judicial notice which is not in any way referred to in the pleadings; but supposing the Court would do this, what are the facts?

The Rajah of Quedah in 1821 was expelled by the Siamese Government from the country and took refuge with his family in Penang—the Siamese held the country till the middle of the year 1842, when the Rajah was reinstated in the government of Quedah. This was the grandfather of the present defendant; while in Penang, Tunku Dai, the third son of the old Rajah, married here Wan Maran, the daughter of the Bundahara of Quedah, and their issue, to the number of 6 or 7, were all born here on British ground. There can be no question as to the nature of the occupation of Quedah by the Siamese; the treaty between Siam and the East India Company of 1826, through Major

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Burney, in article XIII., states that the English engage to the Siamese that they will not permit the Rajah, who is styled "the former Governor," to attack, disturb or injure in any manner the territory of Quedah, which is there stated to be *subject to Siam*, and in another part of the *Treaty a Siamese Country*—vide article X; and that the Siamese should remain in Quedah and *take proper care of it*; that the inhabitants of Quedah and Penang should have trade and intercourse, and that the Siamese should levy no duty upon certain articles of food required by the inhabitants of Penang, and should not farm the mouths of the rivers of Quedah, &c. Whatever may be the question of the Rajah's sovereignty, there can be no doubt that the country of Quedah was permanently occupied and treated as part and parcel of the territories of the Siamese Empire. I will not say that the country was conquered because in the whole of their conduct, the Siamese treated the country as having belonged and belonging to them, and that it was their due right to expel the old Rajah from the government of it, whom they style a *Governor* and the acts of the Siamese were by this treaty recognized by the British Indian Government as being legitimate; and this part of the treaty not only remains till now unrepealed but has had double effect given to it by the late Treaty of the Home Government with the Siamese confirming it, and in 1831, while the old Rajah was a refugee in Penang, the Ligor Chief and Mr. Ibbetson, then the Chief Officer in the Straits Settlements, settled the boundaries between Quedah and Province Wellesley.

Can it then be said that when the present Rajah was born he was the son of an independent sovereign, assuming that his grandfather was an independent king. When he was driven out of his country he certainly was not king *de facto* and whatever his claims were the British Government recognized them not, but on the contrary supported the Siamese authority in Quedah; in the same way that the British Government now recognize the French Empire under Napoleon the Third. What is now the position of the family of Louis Philippe; would the issue of a son of his now born in England be considered a French or an English subject? Would he not be considered in a British tribunal as being a natural born subject in the same way as it would view the child of any French parents born in England; whose subject otherwise would such a person be?

That the Rajah of Quedah was afterwards reinstated in his Government can add no difficulty to the subject, assuming that by it he resumed his sovereignty, because it is not the case of any expulsion from his kingdom which he regained before the authority of the invador was recognized by the British Government; here his expulsion and the Siamese authority in Quedah was recognized by the British Government for upwards of 20 years during which time he was neither King *de facto* nor *de jure* so far as the British Government and its tribunals of justice are concerned, which always act in unison with the Government with regard to its foreign relations; and the issue of any of his sons

born within British dominions must come within the general rule making the issue a natural-born subject. MAXWELL, R.
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By the law of England a natural-born subject can never divest himself of that character without an act of parliament freeing him from its responsibility. Bowyer's Constitutional Law, 402. In the case of *The Duke of Brunswick v. The King of Hanover* who was a British subject, 6 Beavan, the Master of the Rolls decided, notwithstanding his acquisition of a kingdom, that the inviolability of the King, who was a British subject, as a sovereign prince was modified by his character and duty as a subject of the Queen of England; that he was exempt from all liability of being sued in the English Courts for any of his acts as King of Hanover, but that, being a subject of the Queen, he was liable to be sued in her Courts in respect of any acts and transactions done by him or in which he might have been engaged as such subject.

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It is true that the decision there was founded on the particular circumstance that the King of Hanover, after his accession to the throne, so far from renouncing or having any desire to renounce his allegiance to the Crown or his subjection to the laws of England; so far from admitting it to be questionable whether his sovereignty and the recognition of it by the Queen had dissolved such allegiance or subjection; *had renewed* his oath of allegiance and taken his seat in the English legislature; and had claimed and exercised the political rights of an English subject and peer.

But the Master of the Rolls in delivering his judgment with reference to the similar position of other princes to the countries of their origin in Europe, said "there are in Europe other sovereign princes who, if not now, have been, subjects of the country of their origin or adoption; upon such a question as this I cannot disregard those cases, but they may have their specialities of which I am not aware."

"I cannot venture to say that a subject acquiring the character of a sovereign prince in another country, and being recognized as a sovereign prince by the sovereign of the country of his origin, may not, by the act of recognition in *ordinary* circumstances and by the laws of *some countries*, be altogether released from the allegiance and legal subjection which he previously owed."

It is evident that the Master of the Rolls strongly inclined to the opinion that, even without the peculiar circumstances of the case before him, the King of Hanover was liable to be sued in an English Court in respect of his acts and transactions as a subject; he evidently intended to say that, whatever were the laws of *some other countries*, the laws of England did not release a subject who might acquire a sovereignty from his allegiance and legal subjection to its laws.

The Rajah may have become a British subject under peculiar circumstances; none however of these circumstances can be attributable to the British Government; his grandfather fled for refuge here with his family from whom the present defendant has sprung; and if it were not owing to the pardon granted the old Rajah by the King of Siam the whole family might be glad of protection; the peculiar circumstances of their case cannot avoid the rule un-

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less they fall within one of the exceptional classes—which they do not. The question is, whether the present defendant is not entitled to the privileges of a British subject or more properly whether he would not have been so entitled, but for any acts he may have committed by which he has forfeited them?

Can it be said that Rajah Brooke is the less a British subject because he has acquired Sarawak?

As to the second point. In the case of *Brunswick and Hanover* it was held that in a suit against a sovereign prince the bill should, on the face of it, disclose that its subject matter constitutes a case in which a sovereign prince is liable to be sued as a subject—in p. 53 of the judgment.

Here it sufficiently appears by the bill that the subject matter of this suit is of that description as it relates to a trading partnership which was originated by the Rajah, which was intended to be and was carried on by the plaintiff in Prince of Wales' Island with a vessel of the Rajah having British colors.

In *Cremidi v. Powell, The Gerasimo* [Moore's Privy Council Cases, vol. xi.] which was the case of a vessel seized by an English man of war during the Russian war, the question was whether the owners of the cargo were to be considered alien enemies and the judgment proceeded to say.—“If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country; if he does not avail himself of the opportunity, he is to be treated for the purposes of the trade as a subject of the power under whose dominion he carries it on; upon the general principles of law applicable to this subject their can be no dispute. The national character of a trader is to be decided for the purposes of the trade by the national character of the place in which it is carried on.”

For the purpose of the partnership transactions carried on by the plaintiff and the Rajah, the same principle must apply. The trade was carried on in Prince of Wales' Island, and for that purpose the national character of the Rajah must be that of an English subject.

Braddell for defendants. 1st.—The statement in the bill that the Rajah was born in Penang is not sufficient to constitute the status of British subject, for there are several exceptions, such as birth in the house of an ambassador, or in a part of the British territory occupied by an enemy: Calvin's case, 7 Rep. 18a, and the Bill does not, as in the case of *The King of Hanover v. The Duke of Brunswick*, charge, in express words, that the King was a subject of this realm. It was for the plaintiff to show that the defendant was subject to the jurisdiction, not for the defendant to shew that he was exempt, and the plea supplies what is necessary on the defendant's part, in stating, as it does expressly, that the Rajah is sovereign prince; *Duke of Brunswick v. King of Hanover*, 5 Beav. 1.

[*Maxwell, R.*—The mere fact of birth in the British dominions is a sufficient allegation of subjection, and if subjection is denied the denial must be specially pleaded, and not being

specially pleaded it must be taken, for the purpose of the argument, that the Rajah is a British subject.]

2nd.—Even if a British subject at the time of his birth, the Rajah is now a sovereign prince, and, as such, is exempt from the jurisdiction of any municipal court,—the King of Hanover's case above cited; and, on the authority of the same case, it is contended that the plaintiff ought to have shewn on the bill that the contract alleged was entered into within the British territory, and was of a character which excluded the supposition that it was entered into by the Rajah in his capacity of sovereign, and there is nothing in the bill to shew, in a part of the world where sovereigns enter into trade for revenue purposes, that the contract alleged in the bill was not an act of state.

3rd.—In the King of Hanover's case, the Master of the Rolls guarded himself carefully throughout his judgment, by restricting every position laid down of a foreign sovereign born in England and owing allegiance to the British Crown being liable to the Courts in England for all acts done by him in his capacity of subject, to the case of such a sovereign himself claiming his rights as a British subject, and actually residing in England in the exercise of such rights at the time of suit brought. Now the Rajah of Quedah, though born in Penang, was so born the son of a sovereign prince then in exile from his dominions, and received by the British Government as such exile, and afterwards restored to his throne in 1842, at which time the defendant was a mere child, and so far from acting as the King of Hanover did after his accession to the throne of Hanover, the Rajah of Quedah has always repudiated subjection to the British Crown, and has never come back to any part of the British dominions since he left Penang in 1842, except on short visits of a day or two on state business. Therefore this case is much stronger than *the Duke of Brunswick v. the King of Hanover*; and at the time of, or within a few months of, the Rajah's birth in Penang this Court at Malacca, held, that his grandfather was then a sovereign prince, and exempt from the jurisdiction of this Court. At that time the defendant's father was in attendance on his sovereign, and the defendant having been born in exile was born in allegiance to his grandfather and not to the British Crown. There is strong authority for saying that the expulsion of a sovereign from his territory does not take away the allegiance of his subjects; see 2, *Howell's State Trials*, 570, 595, 692, and it is contended that although the infant born in Penang owed allegiance in return for protection, this allegiance was only local and temporary and ceased on removal from the British dominions, for, by analogy in English Law which makes the heirs to the crown British born subjects, wherever they may be born, it is clear that in this case the Rajah being born under the allegiance of his grandfather could owe no allegiance to the British Crown, any further and any longer than as a return for protection granted by that crown, and when protection ceased, allegiance ceased with it.

Lord Langdale, in the King of Hanover's case, says "I cannot venture to say that a subject acquiring the character of a

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"sovereign prince in another country, and recognized as a sovereign prince by the sovereign of the country of his origin, may not, by the act of recognition in ordinary cases and by the laws of some countries, be altogether released from the allegiance and legal subjection which he previously owed; but this case must depend on its own circumstances." It is contended that if any circumstances could warrant the conclusion the present case does.

4th.—The Bill states that the Rajah proposed a contract to the plaintiff, and this contract was afterwards agreed upon by the Rajah. At the time of this alleged agreement, the Rajah was certainly in Quedah, and to make him liable to the jurisdiction, under the authority of the King of Hanover's case, the bill ought to have expressly charged that the contract was entered into and completed by the Rajah while he was in the British dominions in the exercise of his rights as a British subject.

5th.—The reasons on which the exemption of sovereigns depend exist in this case, as—how could the process of the Court be served, how could this Court exercise any authority over a man who claims and exerts the right of sovereignty, and who is recognized by this Government as a Sovereign? War is the only remedy between states or sovereigns for injuries when the sovereign, even if a subject of the State, is sued for matters done by him out of the realm at a time when he is not, within the realm.

[He also referred to the following authorities: *Sir Harry Vane's case*, 6 Howell's State Trials, 119. *Taylor and Barclay*, 2 Sim., 213. *Munden v. Duke of Brunswick*, 10 Q.B., 656. *De Haber v. Queen of Portugal*, and *Wordsworth v. Queen of Spain*, 20 L.J. Q.B. 488. *Marten's Law of Nations*, pp. 23, 101, 184, 231. *Vattel's do.* [Chitty's edit.] pp. 2, 93, 102, 106.]

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March 18. *Maxwell R.* The bill in this case states that the plaintiff is a merchant carrying on business here; that the first defendant was born and has resided in the same settlement, but now resides in Quedah, a territory subordinate to Siam, and of which he is the Governor or Ruler under the appointment of the King of Siam, holding such office during his will and pleasure: and that the other defendant is a trader, a subject of Quedah, but now residing in Prince of Wales' Island. It then goes on to state that in January, 1856, the first defendant whom I shall hereafter call the Rajah, was the owner of the British barque the *Gratitude*, but that he had purchased it in the name of Wan Ismail, who appeared as the legal owner; that the Rajah and the plaintiff, about that time, agreed that the plaintiff should take the entire management of the vessel, and employ her in trade wheresoever or howsoever, either on their joint account, or by charter or in freight, or in any other manner that the plaintiff should deem advisable; the plaintiff to make advances for the usual disbursements and expenses of the vessel and for the purchase of cargoes, which were, however, to be eventually borne by both parties equally, and they were also to share equally in profit or loss; the expenses of repairing the vessel and of providing her with rigging, tackle and other necessities were to be advanced by the plaintiff, but to be

borne by the Rajah exclusively. The bill then states that Wan Maxwell, Esq. 1861. executed a power of attorney, to enable the plaintiff to act in the management of the vessel and partnership, with regard to third parties; that the vessel made several voyages, that the account of the first was furnished to the Rajah himself but as to all subsequent accounts, copies of them were taken for the Rajah by Wan Ismail, who was empowered to act for him as his agent. Finally, the bill states that the barque was chartered by one Oong Achoon, in April, 1857, for a voyage to China, and was lost in the month of October in the same year, off the coast of Cochin China; that the vessel was so chartered before, and not, as the bill alleges that the Rajah insists, after the Rajah had requested the plaintiff to return the vessel to him; that the sum for which the vessel was chartered was 6,000 dollars, of which 3,500 were to be paid only on her return to Penang; that the freight was insured in the plaintiff's name in the Calcutta Mercantile Marine Insurance Society who refused to pay, and who were being sued in Calcutta in consequence. The bill concluded by alleging that, not taking into account the said sum of 3,500 dollars, the result of the partnership transactions left the Rajah owing the plaintiff \$2,789.09; it says that Wan Ismail claims some interest in the transactions; and it prays that an account may be taken in this Court of these dealings, and that the defendants may be decreed to pay what shall be found due to the plaintiff.

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To this bill the Rajah of Quedah has pleaded that before and at the time of the commencement of this suit, he was, and still is a sovereign prince, that is to say, the reigning sovereign of the kingdom of Quedah, a state tributary to Siam; and that by reason of the premises, he ought not to be compelled to answer the bill, or any suit in respect of the matter in question in any Court.

The question which I have to decide, on this state of facts is, whether the Rajah of Quedah is amenable to the jurisdiction of this Court in this suit.

The fact of his being tributary to another sovereign is not inconsistent with his own sovereignty, and is immaterial for the purposes of this suit. "Though the payment of tribute to a foreign power does in some degree diminish the dignity of tributary states, from its being a confession of their weakness, yet it suffers their sovereignty to subsist entire." Vattel B. 2. c. 1. s. 7.

Since the full discussion which the question underwent in the case of *The Duke of Brunswick v. The King of Hanover*, 6 Beav. 1., it cannot be doubted that, as a general rule, a sovereign prince cannot be sued in the Courts of a foreign country. To this rule there are exceptions, the chief of which is that if a sovereign sues in a foreign Court, he may be sued there in respect of the same subject matter. The reason of this exception is obvious: in appealing to a Court, he submits to its jurisdiction in respect of the subject in dispute, and he must abide by its principles and procedure in the same manner as an ordinary suitor. Lord Langdale, in his judgment in the case just cited mentions, as other exceptions to the rule, cases where a fund is to be distributed, in

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which a sovereign may have an interest or where his agent is sued in respect of some matter in which the sovereign is interested as principal, in which case he may be made a party to the suit; but these exceptions are perhaps more apparent than real, for in those cases it is not pretended to compel the foreign sovereign to submit to the judgment of the Court. He is merely offered an opportunity of establishing his interests, or of defending them, when the suit is against his agent instead of leaving their defence to such agent.

Another exception to the general rule is that which Lord Langdale laid down in the case already referred to, of *The Duke of Brunswick v. The King of Hanover*. In that case, the King of Hanover, a British subject, a Peer of the Realm and a Privy Councillor, returned to England after his accession to the Crown, took the oath of allegiance to Her present Majesty, and exercised the functions of a Peer and Privy Councillor. While still in England, he was sued by the Duke of Brunswick; and the Master of the Rolls, while holding that, as a general rule, a foreign sovereign is not amenable to the jurisdiction of our Courts, held also that the King of Hanover might be sued in them for acts in which he was engaged, not as a sovereign, but as a private person. The plaintiff contended that this case governed the present. He also contended that the Rajah was not to be considered as a subject in this suit, on the authority of a passage in the judgment of the Privy Council in the case of *The Gerasimo* [11 Moo. P. C. 88] to the effect that "the national character of a trader is to be decided for the purposes of the trade, by the national character of the coun-try, and carrying on a trade there, and to the rule of prize law in such a case, that his property, [or so much of it, at least, as is connected with his establishment in that country,] is subject to capture, as much as the property of natural born subjects. For this purpose, and to this extent, a belligerent has a right to treat all persons who reside in a hostile country, whatever their real national character, as enemies; but it is difficult to see what connection this rule can have with the present case, where there is no question whether the Rajah is friend or enemy. Analogies from the law of prize would not lead to the consequence desired by the plaintiff. If a war had broken out between England and a foreign power, during the trade, the Rajah's share in the joint property would have been protected from capture, though he was a British subject, precisely because he was not domiciled here. See also such cases as *The Osprey*, 1 Rob. 14; and *The Herman*, 4 Rob. 228.

It was contended on behalf of the Rajah, that it did not appear upon the face of the bill that he was a subject of the Queen,—the statement of his being born in Prince of Wales' Island not necessarily leading to the inference that this made him a subject, in the absence of averments negating that he was the son of a sovereign, or of an ambassador, or of an alien enemy in hostile possession of the country. Further, it was contended that

even if the Rajah did not fall within any of these exceptions, it was not law that he was, by his birth in the Queen's dominions, a subject of the Queen. It was also said that there was nothing in the transactions which were the subject matter of the suit to establish that the Rajah had engaged in them as a private individual and not as a sovereign; and that the presumption, according to Lord Langdale, [6 Beav. 58,] ought therefore to be that he had acted in the latter capacity.

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As to the point of pleading, I intimated, in the course of the argument, that I thought the bill sufficient, on the ground that matter need not be stated which should come more properly from the other side; and the argument addressed against the bill seemed to me to be more applicable to the plea. In the absence of averments asserting any of those matters which it was contended that the bill ought to have negatived, I must take it that the Rajah was born of parents in a private station of life, and owing at least actual obedience to our Sovereign.

In this state of facts, I take it to be clear that the Rajah of Quedah was, at his birth, a subject of the Queen, according to our law. In Calvin's Case [7 Rep. 18a] it is said that the incidents to a subject born are, that the parents be under the actual obedience of the King, and that the place of his birth be within the King's dominions. Actual obedience is enough, however momentary and uncertain it be, and if one under such obedience hath issue, that issue is a natural born subject. [*Id.* 6a.] I am not aware that this has ever been doubted to be law; it is followed by all writers of authority, such as Blackstone and Stephen, and is even noticed as a well known rule of our law by Vattel [Bk 1. c. 19 Sec. 214].

Whether the Rajah continued a subject after he became, and was recognised as the sovereign of Quedah, is a different question, but one upon which it is unnecessary to offer any opinion, in the view which I have taken of this case. I shall assume that he did continue, and is now a subject of the Queen; and then the question is whether, being so, he is amenable to the jurisdiction in the present suit.

It is necessary to consider, here, what are the grounds of that general rule which establishes the immunity of sovereigns, and what are the grounds of the exceptions to it. "The question," says Lord Langdale, "is to be determined by that which may be thought to be the law of nations applicable to the case; there is no English law applicable to the present subject, unless it can be derived from the law of nations, which, when ascertained, is to be deemed part of the common law of England."—6 Beav. 45. "If we hold sovereign princes to be amenable to the Courts of this country, the orders and decrees which may be made cannot be executed by the ordinary means. Where is the power which can enforce obedience? If accidental circumstances should give the power, and if, for the supposed purposes of justice, an attempt were made to compel the obedience of a sovereign prince to any process, order, or judgment, he and the nation of which he is the head, and probably all other princes and the nations of which they

MAXWELL, R. 1861. "are the heads, would see, in the attempt, nothing but hostile aggression upon the inviolability which all claim as the requisite of their sovereign and national independence . . . It must be admitted, that the subject is replete with difficulties. These difficulties and the importance of maintaining the legal inviolability of sovereign princes, can scarcely be shewn more strongly, than by adverting to the opinions which have been expressed by eminent jurists, that offences committed by sovereign princes in foreign states ought rather to be treated as causes of war, than as violations of the law of the country where they are committed, and ought rather to be checked by vengeance, and making war on the offender, than by any attempt to obtain justice through lawful means." After citing the opinions of Zouch and Bynkershoek, he says: "When great and eminent lawyers, men of experience and reflection, so express themselves, as to show their opinion, that less mischief would ensue from the unrestrained and irregular vengeance of individuals and of the multitude, than from attempts to bring sovereign princes to judgment in the ordinary Courts of a foreign country where they have offended, however much we may lament that such should be the condition of the world, we may be sure of the sense which they entertained of the difficulty of making, and of the danger of attempting to make, sovereign princes amenable to the Courts of justice of the country in which they happen to be . . . After giving to the subject the best consideration in my power, it appearing to me that . . . suits against sovereign princes of foreign countries must, in all ordinary cases in which orders or declarations of right may be made, end in requests for justice, which might be made without any suit at all; that even the failure of justice, in some particular cases, would be less pre-judicial than attempts to obtain it by violating immunities though necessary to the independence of princes and nations, I think that, on the whole, it ought to be considered as a general rule, in accordance with the law of nations, that a sovereign prince, resident in the dominions of another, is exempt from the jurisdiction of the Courts there."—6 Beav., pp. 48-51.

From the passage just quoted it appears that the rule is founded on this general consideration, that to require a foreign sovereign to submit to the authority of our Courts would be a violation of immunities necessary to his independence and a hostile aggression on his inviolability. This would be a legitimate ground of offence to him and to all other Princes, and might lead to war; and in the choice of evils, it is better that there should be a failure of justice to an individual, than that the state should be involved in danger. And it appears to me that all the exceptions to the rule turn on the existence of peculiar circumstances which preclude the giving of legitimate offence and the consequent danger. Thus, the sovereign who appeals to a foreign tribunal cannot complain that his sovereign rights are infringed by his being required to answer a cross bill, or a bill of discovery, concerning the same subject matter. So, those rights are not invaded when he is made a party to a suit merely for the purpose of giving him the option of defending his interests already imperilled through his agent.

And, as it seems to me, it was upon analogous grounds that Lord Langdale held that the King of Hanover might be sued. "If he came here," he says, "as King of Hanover only, the same inviolability and privileges which are deemed to belong to all sovereign princes would have been his, save in peculiar cases, such as I have referred to" [*viz.*, of a sovereign who sues being required to answer a cross bill, &c.] "he would have been exempt from all process. But coming here not as King of Hanover only, but as a subject, as a Peer of the Realm, and as a member of Her Majesty's Privy Council, can it be reasonably said that he is exempt from all jurisdiction, or in other words, from all responsibility for his conduct in any of those characters . . . can any Peer or Privy Councillor, whatever station he may occupy elsewhere, be permitted to give advice, for which any other Peer or any other member of the Privy Council might be justly impeached, and yet hold himself exempt from the jurisdiction of the highest tribunal in the realm?" p. 55. "Great inconvenience," he goes on to say, "may arise from the exercise of any jurisdiction in such a case. They arise, perhaps, from the two characters which his Majesty the King of Hanover unites in his own person, and from the claim which he voluntarily makes, to enjoy or exercise, concurrently, in this country, his rights as an English subject, Peer and Privy Councillor . . . Remaining in his own dominions, or in the dominions of another prince of whom he is not a subject, he would, as I presume, be exempt from all forensic jurisdiction. But he comes to this country where he is a subject, and claims and exercises his rights as such," pp. 55, 56. "Admitting it to be the general rule, that sovereign princes are not liable to be sued, and that all sovereign princes may consider themselves interested to maintain the inviolability which each one claims, and that any aggression upon it might, in ordinary circumstances, be a cause of war; yet, observing what is stated to be the law of nations in the case of ambassadors, conceiving that a rule applicable only to the case of sovereigns who are subjects, and think fit actively to exercise their rights as subjects, cannot have any extensive application and is not likely to excite any general interest, or any alarm, and having regard to that which is absolutely required to maintain the relation of sovereign and subject in any country, I am of opinion that no complaint can justly or will probably arise, from any legal proceeding, the object of which is to compel, as far as practically may be, a sovereign prince residing in the territory of another prince whose subject he is, to perform the duties of a subject, in relation to his own acts done in the character of subject only." After this survey of the facts he concludes, "I do not think that I ought to presume that a sovereign prince, who deems it to be consistent with his dignity and interest to come here and practically exercise the rights of an English subject, will not also deem it consistent with his dignity and interest to yield willing obedience to the law of England when duly declared." p. 57. In short, the defendant was Duke of Cumberland as well as King of Hanover, and it was because he had, while residing in England, by acts of the most unequivocal kind, which could not be referred to his sovereign

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character, insisted on his rights and privileges of a subject, that the Master of the Rolls thought that he might consider him to have precluded himself from objecting to his being treated, in respect of private and personal transactions, as a private person. In these respects the present case differs altogether from the case of the King of Hanover. Lord Langdale confined himself to "the case of sovereigns who are subjects, and think fit actively to exercise their rights as subjects."—6 Beav. 56. The Rajah has not exercised any such rights. It was competent for any alien to enter into the mercantile adventure which is the subject of this suit. Lord Langdale confined himself to the case of a foreign sovereign residing within the British dominions. The Rajah is domiciled in his own territories. In all the facts, then, which influenced Lord Langdale's decision, the cases differ wholly; and the whole train of reasoning in the King of Hanover's case is inapplicable to the present. It does not fall within any of the other established exceptions to the general rule, nor is it governed by any principle analogous to that on which those exceptions depend.

The question, then, is, whether a foreign sovereign residing in his own dominions is subject to the jurisdiction of our Courts, merely because he happens to be a subject of our country, by virtue of our peculiar law. There is no authority in support of such a proposition, and I think it cannot be supported on principle. Lord Langdale says, in one of the passages already cited, that the King of Hanover would have been exempt from all foreign jurisdiction if he had remained in his own kingdom; and in another, that even in England he would have been entitled to the inviolability belonging to all sovereigns if he had come as King of Hanover only. The former dictum may have had reference to the state of our law at the time when Lord Langdale spoke, which did not enable our Courts, except in certain classes of chancery suits, to reach parties abroad; and the latter may also be possibly susceptible of explanation; but it seems to me that both are correct in the sense applicable to the present subject. Without going the length of asserting that a subject, on becoming and being recognised as a sovereign, is, for all purposes and under all circumstances whatsoever, released from his allegiance, I think that the recognition must be taken as amounting to at least an admission that he is entitled to exercise, in full independence, all those sovereign rights and powers of the nation of which he is the recognised organ. If so, "the danger of attempting to make sovereign princes amenable to the jurisdiction of the country in which they happen to be," which is the ground of their immunity from suit, exists in his case as much as in that of other princes. And if a sovereign may legitimately treat attempts of the Courts of the foreign country in which he is residing, to enforce his obedience to their authority, as a hostile aggression on his inviolability, it seems to me that he has still stronger grounds for so treating such attempts, when made while he is residing not merely beyond the natural limits of their jurisdiction, the limits of their own territory, but in his own dominions.

But there is yet another important fact in this case, to which I must advert. The character of subject not only is not insisted upon by the Rajah, but it is not accepted by him. It is, as it were, thrust upon him by our own peculiar municipal law; and I think that this is a material circumstance in the decision of a question which as Lord Langdale says, "is to be determined by that which may be thought to be the law of nations applicable to the case." Differing from that which is, I apprehend, the general rule in other countries, that the citizens of a state are those who are born, no matter where, of parents who are its citizens, our law declares every man a subject who is born within our dominions. But it seems to me that the danger adverted to by Lord Langdale might be very justly apprehended if it were to be held that a nation which, by virtue of a peculiar law, claims a foreign sovereign for its subject, can justly enforce against him, even when domiciled in his own dominions, all the logical consequences of his filling that character, though he does not claim the character, and the law of his own country and the ordinary understanding and custom of mankind do not impose it on him. If this were so, the son and the grandson of the Rajah would be equally amenable to our Courts, because the Acts of 4 Geo. II., & 13 Geo. III., naturalise the sons and grandsons of natural born subjects; and the descendants of the late King of Hanover, to the latest posterity, would be so amenable, because the Act of Settlement declares all the descendants of the Princess Sophia natural born subjects. I am not prepared to adopt a proposition from which such consequences might be drawn.

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Upon the whole then, after giving the question my best consideration, I think that the Rajah of Quedah is not bound to answer the plaintiff's bill. As a sovereign he is exempt from the jurisdiction of foreign Courts; the facts of the case do not bring him within any of the established exceptions to that general rule; and I am unable to discover any adequate reason in principle, for excepting him for it. The plea will therefore be allowed, and the bill dismissed as against the Rajah of Quedah.

March 20. The Recorder this day, in reference to the above decision, wrote the following letter [a] to the Registrar and requested that it should be communicated to the parties concerned.

"The Resident Councillor, having but lately assumed his office, was not prepared to inform me authoritatively, whether the Rajah of Quedah was recognized by our Government. But I find on referring to a correspondence which passed between the late Governor and me, two years ago, that that gentleman, described the Rajah as an 'independent native chief,' not only in writing to me, but in addressing the Supreme Government. I cannot hesitate to accept Mr. Blundell's opinion on such a point as this. The word 'independent,' thus used, is obviously convertible with 'sovereign'; and having learned from the Resident Councillor that no change has occurred in the Rajah's position,

[a] Letter on record.

MAXWELL, R. “since the date of Mr. Blundell’s letter, I am satisfied that I was
1861.
— “right in considering the Rajah a sovereign prince. My judg-
NAIRNE “ment will therefore stand and the bill will be dismissed as regards
v. “the Rajah.” [a]
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NONIA CHEAH YEW v. OTHMANSAW MERICAN & ANOR.

PENANG. A Chinese female in this Colony, is at liberty to marry, after being divorced
— from her former husband—and such marriage will be held valid, notwithstanding
MAXWELL, R. that, at such second marriage, no guardian (or Wallee) for marriage, is present.
1861.
— The law of China, to the contrary, is not applicable to this Colony.

July 1.

This was an action of ejectment, and the whole question turned on whether a conveyance executed by the plaintiff, to the defendants, of the land in question, in 1845, was binding on her as a married woman. The plaintiff who was a Chinese woman, had been first married to one Lim Ban, she subsequently lived with one Khoo Hoyer Seeoo, and was so living with him at the time she executed the conveyance. He was no party to it; and was dead, when this suit was commenced. The plaintiff maintained she had been divorced by Lim Ban on account of her indolence, and had thereafter married the said Khoo Hoyer Seeoo, and was his wife, and living with him, as such, when she executed the conveyance in question. The defendants denied the plaintiff had been divorced by Lim Ban and had married Khoo Hoyer Seeoo, and maintained that she had quarrelled with him in consequence of being caught intriguing with the said Khoo Hoyer Seeoo, and had thereupon left him [Lim Ban] and gone and lived with Khoo Hoyer Seeoo as his mistress. The defendants also maintained that even if plaintiff’s story was the true one, her marriage with Khoo Hoyer Seeoo was invalid according to Chinese law, and so the deed of conveyance to them, by plaintiff as a single woman, was good and binding. The grounds on which the defendants maintained the plaintiff’s marriage [if any] to Khoo Hoyer Seeoo was invalid, were—1stly, that there was no guardian for marriage who gave her away; and 2ndly, because, according to Chinese law and custom, a divorced wife cannot marry a second time.

Chinese witnesses were examined on the subject of Chinese law, but their evidence shewed that their information was of the slightest character. On that point, however, the learned Recorder relied wholly on Staunton’s Translation of the Chinese Penal Code.

Allan for plaintiff.

The defendants in person.

Cur. Adv. Vult.

December 18. Maxwell R., in delivering judgment, said, that he considered the divorce of the plaintiff by Lim Ban had been clearly established. The question was whether the alleged second

[a] On the subject of recognition, see *Ishmahel Lazamana v. East India Co.* and *In re Trebeck*, ante p. 4.

marriage had taken place. The Chinese law permitted a woman to marry a second time, unless she received an honorary title from the Emperor during her first husband's life [*Staunton's Penal Code*, p. 112]. But to render the second union a marriage, there must be a person to give the woman away to the new husband and a delivery of marriage presents, otherwise it was considered simply as a case of concubinage. [*id.*, p. 113]. If this rule were in force here, it was plain that the marriage set up could not be sustained, for the plaintiff admitted that neither her uncle, the head of the family, nor any one else, gave her away. But the rule could not be held essential here under English law, where a very different degree of liberty and respect was accorded to women than in China or other part of the East. In China a woman appeared to be, as in India, in a state of perpetual tutelage, and to be either under a general incapacity to contract, or to have no right to dispose of her person as she pleased. The necessity of giving away was not so much a part of the ceremony, as a consequence of the general law relating to the status of the woman. But here this must be determined by the English, and not by Chinese law. It must be taken, therefore, that the uncle's not giving her away did not make the ceremony a nullity, if in other respects, it was a valid marriage.

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The question however, remained, had the plaintiff ever been married to Khoo Hoye Seeoo, and on this point the evidence was conflicting. The plaintiff said that several persons were present at the marriage; Nonia Engku, Nonia Luan, her sister Chiah Lian, Chan Su Phan and Chuah Hin. The two latter were dead. Lian denied that she was present. Engku was not called. Tian Tek who was said to have been at the feast, denied that he was. The only persons who gave any evidence in the affirmative were, the wife of an actor who said that she was sent for by the bride,—a man who said he carried trays to her house, with candles, pigs-feet and fowl in the morning, and assisted in laying the table for the feast in the afternoon,—and one of the guests who said that he was at the feast. It was not improbable that there was a feast at some time; but though that might be some evidence of a marriage having taken place, it did not constitute a marriage. On the other hand, Nonia Lian positively denied that she was present. The plaintiff admitted that Nonia Sin, another sister, was not there; her half sister Nonia Eh Long was also absent; so that the evidence before the Court failed to shew that any of her relations were present. Again, though he was of opinion that it was not essential to the marriage that the woman should have been given away by her uncle, yet the fact of her not having been so given away, according to the usage of her country, had a very material bearing on the question whether there had been any marriage *de facto*. The Chinese were more than any other people, attached to their usages, and the admitted absence of the uncle therefore threw great doubt on the question. Besides, looking to all the circumstances, was it likely that there was a marriage? From the evidence, though conflicting, he had no doubt that there was cohabitation before the marriage. The divorce paper did not

MAXWELL, R. mention the adultery, but it was natural that it should not. But
 1861. it was more probable that this was the real cause of the divorce,
NOMIA than the indolence of the wife, or her temper, as she alleged, es-
CHUAN YEW pecially as several witnesses had spoken to the fact of the adul-
 v. tery. If there had been a marriage, one would have expected that
OTHMANSAW the family would have taken care that it took place, as publicly as
MERICAN possible and with full ceremonies. The whole object of it would
& ANOR. have been that the woman's position in life should be rehabilitated,
 and that the marriage should throw a veil over her previous mis-
 conduct. This assumed, indeed, that the woman and her friends
 were sensitive on the subject of marriage or no marriage. But it
 appeared clearly in this case—as it had appeared in every other
 case in which the subject had been mentioned, in Court—that the
 Chinese [of this place at all events,] visited with no social ban or
 degradation, women living in a state of concubinage. Their wives
 visited them, and associated with them, as wives [*bini*]. There
 appeared to be no inferiority in their social status. What object
 then could there have been for a marriage, after living for a year
 with the man, as the plaintiff would appear to have done? None
 apparently; and coupling this with the important fact that the
 woman had not been given away by her nearest male relative, with
 the absence of all publicity, and with the fact that no witnesses had
 spoken to the marriage, but the actor's wife and the man who
 carried the tray with fowls, &c., while of others said to have been
 present, some denied it, and some were not called, he [the learned
 Recorder] must come to the conclusion that there was no marriage
 —and therefore the conveyance by the plaintiff, as *feme sole*, to the
 defendants of the land in question, perfectly good, and binding on
 her, and there must therefore be judgment for the defendants with
 costs.

Judgment for defendants.

TAN KOK SENG v. LETCHMAN CHETTY.

SINGAPORE.

MAXWELL, R.
 1866.

July 18.

An insolvent who pays a creditor a sum over and above a certain composition which he has arranged to pay his general body of creditors, in consideration of such creditor consenting to appear as an assenting creditor to such composition, is entitled to recover from such creditor the sum so overpaid by him, as money had and received; and that, whether the sum has been paid by him in money, or by means of a bill accepted by him.

The fact that a bill was accepted by a third party, in consideration of the creditor so consenting to appear as an assenting creditor to the composition, which bill, such third party afterwards voluntarily pays—does not prevent the insolvent recovering from the creditor the money so paid by such third party, in the same way as if he, the insolvent, had personally paid it.

R. C. Woods, senr., on behalf of the defendant, moved for a rule *nisi*, calling on the plaintiff to shew cause why a non-suit should not be entered. It appeared that, on the facts set out in the judgment, a verdict had been entered for the plaintiff; leave,

however, being given to the defendant to move for a non-suit, if the Court should be of opinion that the action was not maintainable. The present motion was made in pursuance of such leave reserved.

Cur. Adv. Vult.

MAXWELL, R.
1860.
TAN KOK
SENG
v.
LEITCHMAN
CHETTY.

On this day judgment was delivered by

Maxwell, R. In this case Mr. Woods moved for a rule to set aside the judgment entered up for the plaintiff, and to enter a non-suit. The facts were these:—The plaintiff, being insolvent, offered a composition to his creditors, which the defendant one of the number, refused to concur in, unless a sum beyond the composition was paid to him, partly in cash and partly by the acceptance of a third person. These terms were complied with, and when the bill thus given to him fell due, its amount was paid by the acceptor. The plaintiff then sued the defendant to recover that sum as money paid to his use, and he recovered judgment at the trial, subject to the present motion.

I think that the judgment should stand, and that no rule should be granted. It is clear that the transaction was a fraud on the other creditors, and it is well established that if the bill had been accepted by the insolvent himself, and had been paid by him at maturity, he would have been considered to have paid it under compulsion, and would have been entitled to recover it from the defendant as money had and received to his use; just as he is entitled to recover the sum, if he had himself paid it down in money; see *Atkinson v. Denby*, 6 *Ex.* 770, and 7 *Ex.* 934, and the authorities collected there. Here, the money was paid by a third person, and Mr. Woods contended that it could not be recovered back because it had been paid voluntarily and with full knowledge of the fact. But to this the answer plainly was, that the party who made the voluntary payment was not seeking to recover it back. The argument was inapplicable to the plaintiff, who had been compelled—[for he was not a free agent under the circumstances, *per* Lord Ellenborough, 6 *M. & S.* 165]—to give the bill, and who was no party to the subsequent payment. He is bound to repay the acceptor, and if he was not entitled to recover this sum from the defendant, who has no legal or equitable right to it, it would follow that his right would be materially affected by the immaterial circumstance that the payment was made through a third person and not by himself directly, a conclusion hardly consistent with good sense. It seems to me that the payment by the accommodation acceptor was substantially a payment by the debtor himself, and as it is plain that he would be entitled to recover the money back if he had paid it himself, it seems to me to follow that he is entitled to recover the amount as if it had been so paid.

Rule refused.

ASHTON AND ORS. v. BAUER AND ORS.

SINGAPORE.

MAXWELL, R.
1866.

October 25.

In deciding whether there has been an appropriation of goods, so as to pass the property therein, the acts relied on must be not only clear, unequivocal and conclusive, but the test is, whether they amount to an actual and final election of the particular goods for that particular purpose.

Where H. G. & Co., in consideration of certain advances to their home firm, by the plaintiff, purchased certain quantities of pepper which they placed in a store room by itself, and thereafter engaged a ship to convey the said pepper home to the plaintiff, and wrote to their home firm expressing their intention of forwarding such pepper by the said ship to the plaintiff, but before they could actually ship the same, they became bankrupt, and immediately thereupon wrote to the plaintiff expressing their intention to have forwarded the goods, but of their having been hindered by their general body of creditors from doing so, and the assignee of H. G. & Co., having sold the said pepper and received the proceeds of such sale,

Held, that there was no appropriation of the pepper to the use of the plaintiff, and although there was a present intention on the part of H. G. & Co., to forward to the plaintiff that particular pepper, yet there was still wanting that final and irrevocable act completing such appropriation, as the forwarding to the plaintiff of the Bill of Lading duly endorsed, on shipping the pepper on board the said ship, or the like.

Action to recover \$7000, damages for the wrongful conversion of certain quantities of black pepper. Hamilton, Gray & Co. [late of Singapore] had intended to ship the pepper to the plaintiffs in pursuance of their agreement; but they [H. G. & Co.] having failed in business, the defendants, Inspectors of their estate [in liquidation] had directed the pepper which was then in H. G. & Co.'s godowns to be sold, and received the proceeds, which they placed to the credit of H. G. & Co.'s estate. The defendants pleaded [1] not guilty, and [2] not possessed. Issue was taken on both pleas. The correspondence and further facts appear in the judgment.

R. C. Woods, senr., for the plaintiffs contended, that there had been a specific appropriation of the pepper to Ashton and Co., as plainly indicated by the correspondence which had passed between the parties; that H. G. & Co. had full authority to make the selection on behalf of Ashton and Co., and that being so, it was not necessary that the transshipment should have commenced. *Fragano v. Long*, 4 B & C 219, and the appropriation being irrevocable—Blackburn on sales, p. 129, the property in the pepper had by such appropriation passed to Ashton & Co., and had thereby become clothed with all the trusts of property so circumstanced; they were held for a specific purpose, and were *not* “in the order and “disposition” of H. G. & Co., or their Inspectors. He referred to *Ex-parte Oursell*, 1 Amb. 296; *Ex-p. Dumas*, 2 Vesey 582; *Mace v. Cadell*, 1 Car. 232; *Sinclair v. Wilson*, 24 L. J. Ch. 537; *Ex-p. Craves*, 25 L. J. Bank 53; *Collins v. Forbes*, 3 T. R. 316; *Kinlock v. Craig*, 3 T. R. 983; *Tooke v. Hollingworth*, 5 T. R. 215; *Arch. Bank. Law*, 333, 337; 1 Desc. Bank, 594, 595; and Banksheal's 'Trusts, 2 Kay and J., 560.

Atchison for the defendants submitted, that if any Torts had been committed, it was by H. G. & Co., in whose possession the pepper was, and that the acts of H. G. & Co. did not transfer any property in the goods to the inspectors. *Stephens v. Badcock*, 3 B. & Adl. 354. He also contended, that there was no obligation binding H. G. & Co., to deliver the pepper, or any particular pep-

per, to the plaintiffs. He also urged that the transaction was incomplete, as no sale or delivery was ever made to Ashton, or any agents in their behalf. There was nothing to shew that any property passed to plaintiffs. It was competent to H. G. & Co., to have retracted the proposed delivery of the goods, and the most that the correspondence disclosed was an intention to deliver: he further submitted that this was a case in which both parties ought to have consented before the goods could be considered as appropriated. He referred to *Godts v. Rose*, 17 C. B. 229, and had the goods been shipped and lost on their way, the loss would have fallen on H. G. & Co.

MAXWELL, R.
1866.
ASHTON
& ORS.
v.
BAUER & ORS.

Cur. Adv. Vult.

On this day judgment was delivered by
Maxwell, R. This is an action of trover for 1,049 piculs of pepper.

Plea, the general issue.

The following are the material facts of the case. Messrs. Buchanan, Hamilton & Co., carried on business in Glasgow as merchants. The firm of Hamilton, Gray and Company, consisting of the member of Buchanan & Co., and of other persons, carried on business as merchants in Singapore, usually remitting produce to the Glasgow house, who employed the plaintiff, Ashton & Co., of London to sell it. In February, 1865, the plaintiffs agreed to open a credit in favor of Buchanan & Co., upon the terms stated in a letter addressed by Buchanan & Co., to Hamilton, Gray & Co., and forwarded to the latter by the plaintiffs. It stated: "Messrs. Ashton & Co., have agreed to open a credit in our favor for £10,000, and in consideration of their doing so, we have agreed that you will send them returns for a like amount direct from Singapore. You will please, therefore, on receipt hereof send Messrs. Ashton & Co., shipping documents for produce to the value of £10,000, from the first shipments you may be making, and which documents under usual circumstances you would be sending home free to us. Insurance will be provided for here. Although we do not contemplate returns in bills, of course you will have recourse to them, if produce is not available, and you have no shipments going forward." This letter was received on the 13th of April, and on the 21st, Hamilton, Gray & Co., wrote to the plaintiffs that they would comply with its terms. On the 5th of April, they had purchased the pepper which is the subject of this action, and it was delivered to them at various times between the 18th and the 29th of April, and placed in a store separate from other peppers. On the 23rd of April, Hamilton & Co., wrote to Buchanan & Co., "at present we have only 1,000 piculs black pepper for this" [£10,000 credit] "in prospect, documents for which we will send as soon as a shipment is made." On the 4th of May, they wrote again to the Glasgow house, "we are not able to send Messrs. Ashton & Co., documents for the black pepper by this mail, but have engaged tonnage for it per *Civiale*, for London at £2." This was true; and it was communicated to the plaintiff on the 12th of June. On the 6th of May, however, Hamilton, Gray & Co., had stopped

MAXWELL B.
1866.
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payment. On the 8th they called a meeting of their creditors, when a committee of five of them, of whom the defendants are three, was appointed to act as Inspectors. On the 16th, another meeting of the creditors was held, at which, on the recommendation of the inspectors, the creditors resolved that the pepper should be sold; and it was sold accordingly on the same day by Hamilton, Gray & Co., and the price of it [\$6,234.20] was paid to the inspectors for the benefit of the general body of creditors. On the 21st of May, Hamilton, Gray & Co., wrote to the plaintiffs, "we would have had shipping documents for some pepper to send you by this opportunity, as part cover for credit C," [a clerical error for O] "but we have not been allowed to do so, and the pepper had to be sold here." No part of the pepper had been loaded on board the *Civiale*.

Under these circumstances, the principal question, and the only one which I need decide, is whether the property in the pepper was vested in the plaintiffs at the time of its sale on the 16th of May. The general rule of law is that, in the absence of intention to the contrary, the property in goods sold vests immediately in the buyer, when they are specific and ascertained; but that when the goods are unspecified, the property in them does not vest in him until the vendor has appropriated certain specific goods wherewith to fulfil the contract, and the purchaser has assented to the appropriation; or without that assent, when the contract is of such a nature as dispenses with it, and leaves the appropriation exclusively with the vendor. If, in this case, Hamilton & Co., had proposed to the plaintiffs to appropriate the pepper to their contract, and the plaintiffs had assented to it, the property would have at once passed to them. The assent of the purchaser would have made the appropriation final and irrevocable. But the property might have passed in this case without any such assent, for the contract was one of those in which the appropriation might be made by the vendors exclusively; and if they did make an appropriation the property in the pepper would thereupon have passed to the plaintiffs, though without prejudice to their option of rejection ultimately, if the goods were not of the kind ordered; per Bramwell B. in *Langton v. Higgins*, 28 L. J. Ex. 252. But the appropriation must be clear, unequivocal and conclusive. There must be an actual and final election to appropriate the goods to the contract, and not a mere intention to do so; and the test for determining whether the acts or conduct of the vendor amount to the former, or are merely expressive of the latter, seems to be, whether the final acts towards complete appropriation has been done, or at least begun. If unspecified goods are ordered, on the terms of being despatched to the purchaser, the property vests as soon as the goods leave the vendor's warehouse for dispatch; *Fragano v. Long*, 4 B. & C. 219; but it would not vest on the goods being made or prepared, or even packed, or before the dispatch had actually begun; *Atkinson v. Bell*, 8 B. & C. 277.

In the case just cited, the defendant had ordered two machines of the plaintiff who made and packed them, and wrote to the de-

fendant to ask by what conveyance they should be sent; and it was held that in that state of things, and before the delivery or dispatch had been begun, the property in the goods had not passed to the defendant. Though the plaintiff's intention to appropriate them was manifest and unequivocal, he had not made the final and irrevocable appropriation of them which was necessary to operate a transfer of the property in them. The present case seems to me to fall within the same principle; that Hamilton, Gray & Co., intended to appropriate the pepper to the fulfilment of the contract with the plaintiffs, seems beyond question. They wrote, not to the plaintiffs indeed, but to their own correspondents, that such was their intention, they contracted for the carriage; and they afterwards wrote to the plaintiffs that they would have sent it, if they had been allowed. All this, however, does not appear to me to amount to an actual appropriation; but only to shew that there was then a present intention to make an appropriation at a future time. There was still wanting the final act of forwarding the bill of lading, endorsed, to the plaintiffs, or at least of the loading of the pepper on board the ship, which might perhaps have brought the case within the decisions in *Aldridge* and *Johnson*, 7 E. & B. 885, and *Langton v. Higgins*. If the warehouse had been burnt down and the pepper destroyed, the loss would, it seems to me, have fallen on Hamilton & Co., and not on the plaintiffs; and notwithstanding their repeated declarations of intention, it would have been optional to them to put other pepper or other produce into the ship which they had hired, without any infringement of the rights of the plaintiffs.

For these reasons, I think that the judgment should be for the defendants.

MAXWELL, R.
1866.

ASHTON
& ORS.

v.
BAUER & ORS.

WEE KOW v. CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA.

The maxim *caveat emptor* has no application to a case where the vendor professes to sell a particular article, which turns out subsequently to be, not that article, but some other article altogether: and the vendee is entitled to recover back as money had and received, the purchase money he paid for such particular article, as there was a total failure of the consideration for which it was paid.

SINGAPORE.

MAXWELL, R.
1867.

January 20.

This was an action for money had and received: the facts giving rise to it sufficiently appear in the judgment.

Davidson for plaintiff.

Atchison for defendants.

Maxwell, R.—This case is one which presents no difficulty. There is a question of fact and a question of law, and both appear sufficiently plain. Mr. Crane, under the instructions of the Bank announced for sale by auction eight chests of opium. The chests were declared at the auction to be opium. The plaintiff bid and became the purchaser of two, paid their price and carried them away. Two months afterwards, he sold them to the opium farmer and on their being opened, one was found to contain balls, not of opium, but of gutta, gambier or mud. He now claims to recover

MAXWELL, R. from the Bank the price which he paid for this chest, and I think 1867. that he is entitled to recover it.

WEE KOW
v.
CHARTERED
BANK OF
INDIA, &c.

The first question is one of fact, *viz.*, whether the chest, when opened, was in the same condition as when it was sold by the Bank; and I think that the evidence is sufficient to satisfy me that it was. The two chests were kept in the plaintiff's shop, in a place where it was necessarily, all day, under the eye of the plaintiff, his shopmen and customers. It could not, therefore, well have been tampered with in the day time. At night, the plaintiff's son and his clerk slept in the premises, and no other person. There was no evidence of any entrance by thieves at night; and if any had entered, they would not have passed their time in taking out the opium and substituting mud in its place, and then restoring the box to its original outward condition, but they would simply have carried the chest bodily away. The opium examiner of the farmer, a man of experience in such matters, said that the sewing of the canvas appeared black and therefore old, and that the lid of the box bore no signs of having been previously opened. I think, therefore, that upon this evidence, the reasonable conclusion is, that the box did not contain opium when the sale took place, and that the Bank was the victim of a fraud.

Then comes the question of law, is the Bank bound to repay the price? This admits of no doubt. The maxim *caveat emptor* does not apply. It is not a question whether the opium which they sold was of good or bad quality, but whether they delivered to the plaintiff what they professed to sell to him, *viz.*, a chest of opium. If they did not, they did not, perform the contract into which they entered. They could not have sued him for the price; and if he has paid it to them, he may recover it, as it seems to me, as money had and received to his use, on the ground of a total failure of consideration.

For these reasons I think that the plaintiff is entitled to judgment for the sum claimed.

RUNGASAMY v. ISAAC AARON PILLAY.

SINGAPORE.

MAXWELL, R.
1867.

February 22.

Where a builder contracts to erect a building in a certain manner, but neglects to do so, he is not entitled to recover the price of such work on the contract, nor yet on a *quantum meruit*, even though the owner take possession and has the use of the work so done, as no implied promise arises from the fact that the owner has so taken possession, as he but makes use of his own land and all that is affixed thereto.

Munro v. Butt, 8 E. & B. 738, followed.

Action for work and labour done. Plea, never indebted and that the cause of action did not arise within three years before suit. The facts appear sufficiently in the judgment.

The parties appeared in person.

Maxwell, R.—In this case, the plea of the Statute of Limitations is probably an answer to the plaintiff's claim, but I prefer for his sake, to dispose of it on the ground of substantial justice. He agreed to build a house for the defendant for a sum of 650 dollars, of

which he was to receive 150 as soon as the walls were raised to 12 feet, and the timbers for the upper floor, of certain dimensions were laid. When he claimed this sum, it was found that the walls were six inches under the requisite height, and that some of the beams were under the requisite size. It was also found that some of the wood-work of the windows was of inferior wood. The defendant refused to pay, the plaintiff refused to continue the work, and another builder was called in, who raised the walls to the proper height, substituted proper beams and wood, and finished the house. That the plaintiff cannot recover the 150 dollars under the contract, is plain, for he did not perform that which he was bound to perform precedent to the payment. The only question is, whether he can recover anything independently of the contract, for work and materials of which the defendant is at present unquestionably enjoying the benefit. If a man contracts to buy certain goods, and goods of a different description are delivered to him, it is clear that the seller has not performed his part of the contract, and therefore cannot sue the buyer for the contract price. But if the buyer keeps and consumes the goods delivered, it is equally clear that he must pay for them; for as he had the option of rejecting them when he found that they did not answer to the description contracted for, his retaining them shows conclusively, both in law and in honesty, that he intended and undertook to pay a reasonable price for them. But the same presumption does not arise where the contract is to build on a man's land, and the building being not according to contract, the owner uses and occupies it. He cannot reject the house as he can goods. He is not bound to pull it down and to send back the materials, even when the latter were supplied by the builder. He is entitled to the use of his land and of all affixed to it; and consequently from his taking bodily possession of the building and occupying it, no contract to pay for it can be inferred. The plaintiff therefore must fail, for there is neither express nor implied contract to support his claim.

MAXWELL, R.
1867.
RUNGASAMY
v.
PILLAY.

In so deciding, I merely follow the decision of the Queen's Bench, in *Munro v. Butt*, 8 E. & B. 738, also an action on a builder's contract. The plaintiff had it in his power to perform his contract honestly; and if he did not choose to do so, it is neither hard nor unreasonable that the loss of his labour and materials should be the penalty of his attempt to impose. It would fritter away contracts if in such a case a builder were to be entitled to recover a reasonable sum for his work and materials. He would, in this case, according to the estimate of the architect, be entitled to a larger sum than the contract sum, and the law would thus offer a premium on the breach of an agreement.

Judgment will be for the defendant.

LIM MAH PENG v. G. H. BROWN.

SINGAPORE.

MAXWELL, R.
1867.

March 5.

Plaintiff having arranged on a composition with his creditors, of whom the defendant was one, to pay them 50 per cent. of their claims, by means of three bills payable at three, six and nine months respectively, handed the defendant three bills, which, by mistake, were made out, together for 75 per cent. of his claim: the first two bills were duly paid at maturity, which together made up just 50 per cent. of the defendant's original claim. Before the third bill fell due, the defendant failed in business, and had himself to enter into an arrangement with his creditors, by which certain Inspectors were appointed to collect his assets, and among others the amount payable on the third bill, and to divide them among his several creditors. On the third bill falling due, the plaintiff paid the defendant's Inspectors \$500 to account of it, and this money was, by the Inspectors, distributed among defendant's creditors. After this, the plaintiff discovered the mistake he had made, and not only refused to pay the Inspectors the balance payable on the third bill, but claimed from the defendant, a refund of the \$500, which he (plaintiff) had paid under such mistake. The defendant refused to refund the money, alleging that he was not liable to do so, as the money had been paid by the plaintiff to his (defendant's) Inspectors, and by them had been distributed among his creditors; and he personally had derived no benefit by the payment,

Held, that the defendant was bound to refund plaintiff the \$500, and that the plaintiff was entitled to recover it as money paid at the defendant's request, or as money had and received by the defendant for the use of the plaintiff.

The facts giving rise to this case sufficiently appear in the judgment.

Atchison, for plaintiff.

A. M. Aitken, for defendant.

Maxwell, R.—This is an action to recover a sum of \$500 said to have been paid by the plaintiff at the request of the defendant, and for money had and received by the defendant for the use of the plaintiff under the following circumstances. The plaintiff compounded with his creditors, upon the terms of paying them fifty per cent. on their debts by three bills at three, six, and nine months. The defendant was one of the creditors; his debt amounted to 4,282 dollars, and three bills were given to him. It appears, however, that through an oversight each bill was made for \$1,070.50, or 25 per cent. of the debt, so that the defendant obtained bills for \$3,211.50, or 75 instead of 50 per cent. He, in turn, fell into embarrassment; and being obliged to enter into an arrangement with his creditors, he transferred the bills to Inspectors appointed under deed, for the purpose, among other things of collecting his assets and paying his debts. The first two bills were duly paid at maturity, and when the third was presented for payment the plaintiff paid to the Inspectors 500 dollars in part payment of it; and they paid the sum away among the creditors of the defendant. The plaintiff afterwards discovered the error, and called upon the defendant to refund the 500 dollars. This being refused, the present action was brought.

I am of opinion that the plaintiff is entitled to judgment. It is clear that if the 500 dollars had been paid to the defendant personally, he would have been bound to return the money. So, if he had endorsed the bill for value, he would have been bound to repay the plaintiff the amount which the latter had been obliged to pay to the holder. But it was contended in this case, that because the money was paid to the Inspectors, and was distributed by them among the creditors of the defendant, and the latter, it was said, had derived no benefit from the payment, he was not

liable to refund the amount. It seems to me, however, that the payment to the Inspectors, was a payment made to the use of the defendant at his request. It was paid to persons to whom he had transferred the bills, [whether as holders for value or as his agents, it was immaterial to inquire,] and to whom, therefore, he impliedly requested the defendant to pay the amount. Whether he derived any benefit from the subsequent application of the money is immaterial; it would have been equally money paid to his use and at his request, though the Inspectors had thrown it into the sea. But I may observe that every farthing of the money appears to have been applied in the manner directed by the defendant, and in common honesty as well as in law, it would be difficult to suggest a more advantageous manner of disposing of money, than that of paying its owner's debts with it. There will be judgment for the plaintiff for the amount claimed, and costs.

MAXWELL, B.
1867.

LIM MAH
PENG
v.
BROWN.

ABDULRAHIM v. DRAHMAN & ANOR.

A person who is administrator of a deceased person, is entitled to recover possession of title deeds belonging to such deceased, from another with whom they may have been deposited, although such deposit may have been for valuable consideration, and made by such person who is administrator, as a next of kin, jointly with other next of kin, but before he has obtained administration to the estate of such deceased.

PENANG.

HACKETT, J.
1867.

May 24.

Such a deposit affords no defence, either at law or equity, to a claim by such person depositing, when he has clothed himself with the title of administrator, by obtaining Letters of Administration.

This was an action to recover possession of certain title deeds belonging to one Din deceased, and which deeds, the plaintiff claimed, as administrator of the said deceased. It appeared that the plaintiff along with his sister one Samsiah, who were the only next of kin of the said Din, on the 23rd of October, 1865, in consideration of a loan of \$60, then made to them by one Wahab, deposited the said title deeds with the said Wahab, as security, and executed a paper written in Malay, to that effect. That on the 28th October the said Wahab, with the consent of the plaintiff and his said sister, agreed to assign the said security and title deeds held by him, to the female defendant Essah, on her paying him, Wahab, up the \$60 due him by the plaintiff and his sister, and Wahab accordingly then executed an assignment, in English, of the same to the defendant Essah, and was then paid his \$60. At this time the plaintiff was not administrator to the estate of Din, and no one had taken out letters of administration to his estate. On the 5th September, 1866, the plaintiff applied for and obtained Letters of Administration to Din's estate, and then commenced this action against the defendants, to recover possession of such deeds. The defendant Drahman was the husband of the female defendant Essah. The defendants set out these facts in their second plea, which they pleaded on equitable grounds.

B. Rodyk, for plaintiff.

D. Logan [*Solicitor-General*], for defendants.

Cur. Adv. Vult.

HACKETT, J.
1867.

ABDULRAHIM
v.

DRAHMAN
& ANOR.

May 30. *Hackett, J.*—This is an action for the recovery of title deeds. There is an equitable plea that the defendants, at the request of the plaintiff, advanced the sum of \$60, to one Wahab, who held an equitable mortgage on certain lands belonging to the deceased, and that the title deeds of these lands are the title deeds now claimed by the plaintiff. The defendants' case is, that Wahab and the plaintiff came to the defendant Essah, and asked for a loan, this evidence of the defendant Essah is confirmed by that of Drahman, Dolah and Wahab. The plaintiff's case is, that he never owed Wahab any money, that he only deposited the deeds with him for safe custody, and that he never asked Essah to advance the money, that in fact he was, at the time of the advance, absent from Penang, on a voyage, in his calling of a sailor. As to the question of fact, I consider the weight of testimony is in favour of the defendants, besides, from the plaintiff's own account, it is manifest that he was not absent at the time of the advance made by Essah. Then, there is the question, whether the mortgage by Abdulrahim, before he obtained Letters of Administration, can stand—and on this point, I have reluctantly [reluctantly I say, as I have no doubt the defendants would never have lent the money, unless they believed that the plaintiff would never claim back the deeds till the money was paid,] come to the conclusion, that it cannot. No dealing by the next of kin, with the estate of a deceased person, is binding on them, unless it is beneficial to the estate. *Morgan v. Thomas*, 22. L. J. Exch. [N. S.] 152. This is clearly so at law; and the present dealing with the estate, incumbering it with an equitable mortgage, I am of opinion, is not beneficial to the estate. Such dealing is also not looked on favorably by the Court, as it is an attempt to administer the estate, without administration, and in fraud of the revenue. Then, does it make any difference that the present defence is pleaded on equitable grounds? I think not. In this matter, both for the benefit of the revenue [as equity cannot countenance a fraud,] as well as for the benefit of the estate, equity will follow the law. The fact that all the other next of kin interested have concurred in the mortgage, cannot make any difference. When administration is taken out, and the defendants seek to enforce their security against the equitable interests of the plaintiff as a next of kin, this Court, as a Court of Equity, will no doubt help them; and in doing this, equity will be speeding on the administration of the deceased's estate; but to hold that, in equity, the defendants are, under the circumstances, entitled to withhold these deeds from the administrator, would be to hinder the administration of the estate; and that, I am of opinion, equity will not do. The plaintiff has since the deposit, but prior to this suit, clothed himself with the title of administrator, and brings this action as such: to such an action, the defence based on the facts as found, can afford no answer at law or equity, for the reasons given. There will, therefore, be judgment for the plaintiff, for the recovery of the title deeds, and costs.

CHARTERED MERCANTILE BANK, &c., v. D'RODAS.

The release of a prisoner taken into custody on civil process, though permitted by the bailiff, does not debar the plaintiff from re-arresting him, unless the plaintiff has consented to, and ratified the act of the bailiff.

Regina v. Renton, 2 Exch. 216, remarks of Parke B. observed on.

The fact that the bailiff so releasing, is a *special* bailiff of the plaintiff, makes no difference in this respect.

SINGAPORE.

HACKETT,
Ag. C. J.
1867.

December 3.

Atchison, on behalf of the defendant, had obtained a rule calling on the plaintiff Bank to shew cause, why the defendant should not be discharged from custody. It appeared that the plaintiff Bank recovered judgment against the defendant, lately Spanish Consul in Singapore, for a considerable amount; but being unable to take the defendant on a *ca. sa.*, employed a special bailiff to arrest him, which he did one night after great trouble, and expense to the plaintiff, in the harbour of Singapore. The defendant, after being arrested, was allowed by the special bailiff to go upon his parole till the following morning, and when allowed to do so, he assured the bailiff upon his word of honour, and as a grandee of Spain, that he would surrender himself to the Sheriff next morning at the Court House. The following morning the defendant, in keeping with his word, surrendered himself, and in the afternoon was sent to Her Majesty's Jail. He thereafter made this application for his discharge.

A. M. Aitken, for the plaintiff, shewed cause.

Atchison supported the rule.

Cur. Adv. Vult.

On this day judgment was delivered by

Hackett, acting C. J.—This was a rule calling upon the plaintiff to shew cause why the defendant should not be discharged out of the custody of the Sheriff, and the question I have to decide is, whether or not, the defendant is lawfully in custody. After referring to the affidavits which were filed by the defendant, and which differ very materially from those filed by the plaintiff, the defendant having omitted facts which materially altered the circumstances that took place between the actual arrest and the voluntary surrender of himself to the Sheriff,—I consider,—although the special bailiff committed a very grave offence in allowing the defendant to get out of his custody, and behaved very foolishly in so doing,—his affidavit is corroborated by the Sheriff's, and I cannot help thinking that the defendant has been advised to omit some material facts. It has been contended for the defendant, however, that having been once taken on a *capias ad satisfaciendum* and been allowed to escape, no matter by what means, or by whose fault, that the claim the plaintiff had upon him was lost. I have therefore been at considerable trouble in looking up the point, and taken great pains in considering the subject before arriving at a decision. In one of the cases, cited by the defendant's counsel, that of *Regina v. Renton*, 2 Exch. 216, reliance was placed upon what Parke B. is reported to have said [pp. 219, 221] to the effect that while the Crown could retake the prisoner after his voluntary escape, a private individual could not do so. These passages, I think, must merely be taken as

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obiter dicta, as they are at variance with all the other authorities on the subject, and not only so, but the same learned judge in a subsequent case,—*Ward v. Broomhead*, 7 Exch. 726 (at pp. 727, 728), takes a very different view of the matter. From this last passage he would appear to have changed his mind, and considered that to make an escape valid, the plaintiff [a private person] must ratify and confirm it. This latter opinion is in unison with the other authorities. In *Chitty's Archbold's Practice*, Vol. I. [11 Ed.] 693, a book accurately edited and kept up to the present state of the law,—it is laid down, that the plaintiff might issue out a fresh writ if the defendant has escaped under the first, and several authorities are cited for that position. Taking all the cases which I have been referred to by counsel, as well as those I have turned my attention to myself, I am of opinion that the law is clear, that even supposing the defendant was allowed to go at large after arrest, unless with the ratification and consent of the plaintiff, the plaintiff might sue out a fresh writ, and the defendant might be lawfully arrested and placed in the custody of the Sheriff. In the present case the defendant was legally in custody, and he asked the special bailiff to allow him not to go to the Jail, but to allow him to remain at the hotel for the night, and that he would surrender himself to the Sheriff next morning. This was done without the plaintiff's knowledge, and the defendant, the next day, voluntarily surrendered himself as he had promised. From the cases of *Lenthal v. Lenthal*, 2 Liv. 109, and *James v. Pierce*, Ibid, 132 s. c. 1 Vent. 269,—which were confirmed by the American case which I have been referred to, and the remarks therein of Hubbert J.—I think, it is abundantly clear, that the authorities cover the present case. I can only treat this case as one of voluntary escape, and that execution stands clearly against the defendant, it would be hard if it were otherwise. Something was said by counsel during the argument, about a special bailiff being employed, but the only difference that fact made, was, the escape taking place from him, the plaintiff lost his remedy against the Sheriff, for the escape. Had the defendant not kept his word as a gentleman; but had he escaped and gone on board a ship in the harbour, a fresh writ, had it been applied for, could have been issued against him, and he would have been again placed legally in the custody of the Sheriff. For these reasons, I think, this rule must be discharged.

VERAPPA CHETTY v. VENTRE.

PENANG.
—
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1868.
—
February 27.
—

In all questions of sea worthiness, the law of the country to which the ship belongs, must prevail.

In order to constitute deviation, there must be a voluntary act on the part of those on board, to turn out of the course: and any going out of that course, which is attributable to ignorance, or tide, or weather, is not a deviation.

This was an action on an instrument commonly known as a Chetty's Insurance. The facts and questions are fully set out in the judgment.

The case was heard on the 25th, 26th February, and on this day.

D. Logan, Solicitor-General, [R. C. Woods, junr., with him] cited *Davis v. Garrett*, 6 Bing. 716; *Phynn v. Royal Exchange Insurance Co.*, 7 T. R. 505; *Tait v. Levi*, 14 East 481; 2 Arnold on Insurance, 675; and Phillips on Insurance, 974, 1051.

B. Rodyk, for defendant, cited *Walker v. Maitland*, 5 B. & Ald. 171; *Busk v. Royal Exchange Assurance Co.*, 2 B. & Ald. 73; *Smith v. Scott*, 4 Taunt. 127; *Holdsworth v. Wise*, 7 B. & C. 794; *Bishop v. Pentland*, 7 B. & C. 219; *Dixon v. Sadler*, 8 M. & W. 895; *Ionides v. Universal Marine Association*, 32 L. J. C. P. 170.

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Cur. Adv. Vult.

July 13. *Hackett, J.*—This was an action brought by the plaintiff to recover the sum of \$4,000, with interest, lent by the plaintiff to one Joseph Charles Anglés for whom the defendant was surety, and the facts of the case are as follows:—

In the month of January, 1866, Joseph Charles Anglés, who was master and part owner of the French ship *Charles Julie*, borrowed \$4,000 from the plaintiff, and in consideration of the loan, the defendant joined Anglés in executing a deed upon which the present action is founded. By this deed, which recited the loan to Anglés, for twelve calendar months, on the understanding that the *Charles Julie* might during that period be employed in voyages from Penang to Rangoon and back, and to Singapore and back, and should eventually return to Penang, within the aforesaid time, the defendant and Anglés jointly and severally covenanted, that the said vessel would not go on any other voyages, or deviate from those authorized by the said deed, [the perils of the seas, &c. excepted] and should return to Penang at the stipulated time. Then there was a covenant, by the defendant and Anglés for payment of the principal sum with interest at 2 per cent. *per mensem*, ten days after the arrival of the vessel at Penang from the last of her voyages, and a proviso, that if she should previously have been totally lost, the principal and interest should not be payable to the plaintiff. And as a further security Anglés assigned his interest in the *Charles Julie* to the plaintiff.

The plaintiff in the first count of his petition alleged that the “vessel without sufficient cause deviated from the said voyage and “never went to Singapore, whereby the said bottomry bond was “determined, and the said \$4,000 became immediately due and “payable by the defendant to the plaintiff.” The defendant to the first count pleaded that “the said ship did not deviate from the “said voyage to Singapore as alleged,” and upon this plea issue was joined.

From the evidence it appeared that the *Charles Julie*, a three masted schooner sailing under French colours, left Penang on a voyage to Singapore on the 22nd February, 1866. Including the master [J. C. Anglés] there were ten seamen on board. The vessel proceeded on her voyage without accident until the morning of the 25th February. On that morning between three and four o'clock, land was seen on the port bow, which the captain and first mate supposed to be Pulo Cocob, an island in the proper channel, and which, supposing the vessel to be in her right place

HACKETT, J. would have been seen on the port bow. The vessel then appears to have been steered to the south for about four miles "to take" as the captain said, "the mid-channel so as to round Cocob island and the land." He then goes on:

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"Convinced that I was in the channel between Cocob and the Carimons, the breeze having slackened, I ordered to steer to the S. S. E.—S. E. and S. E. $\frac{1}{2}$ E., trying to come to port as much as the land allowed me, so as to take afterwards the direction of the E. S. E. in order to sight Coney Island which was to lead me to the Straits of Singapore, where I was going at day-break, about 6 a.m., without having taken any rest, watching the lead, going up the mast myself with my spy-glass, ordering my mate and my second mate to go there also, I saw through the morning haziness the land on the starboard. I supposed it to be the Carimons, and in the east I saw small islands rather distant. I came up the mast again to look about, trying to see the light of Coney Island, when I observed a change in the colour of the water at a small distance; the looming had already altered the appearance of the land. It was about 7 a.m. I immediately ordered to take in sails and to let go the anchor, but at the same moment my vessel had three violent shakes, having struck on a shoal covered by the sea."

Having been asked what he did when the ship struck, he replied:

"I immediately ordered to sound the pump, and found at first one foot of water in the hold—the vessel was fast amidship. I ordered to sound at the stern and found four feet in the hold. I immediately ordered to lower the boats to free the mainhatch, for throwing cargo overboard to lighten the vessel, but the water was rising in the hold, the vessel was burst, the water was on deck . . . then the vessel had a list to port, and sunk fast. I remained on board the last and left the vessel when urged by my crew to do so . . . I only knew where I was, through a Malay of the name of Said, who came near the vessel at the moment of the wreck and of whom I asked where was the Great Carimon and which he pointed out to me to the Northward. I then perceived the error caused by the currents. I believed the Great Carimon was to the south. I was not able to perceive the error myself, navigating with a chart ending at the beginning of the Great Carimon. The error was then evident. I had been brought by the influence of the currents in the straits formed by the island of Pulo Panjang and the Great Carimon, a channel parallel to the one I wanted to take; and which I thought I had taken, viz., the one formed by Cocob Island and the Carimons, and which would have led me to Singapore."

The evidence of the Captain is in substance corroborated by the evidence of the first and second mates, and as regards what took place immediately before the ship struck, it is confirmed by the evidence of some Malays who, from the shore, saw the vessel strike. A number of witnesses were examined on behalf of the plaintiff to show that there are no currents in those seas which would account for the course which the vessel took, and to prove that with the most ordinary care the vessel could not have got into the position in which she was when she struck. On the other hand, the defendant examined witnesses who testified that there was a current in the Straits which might have carried the vessel out of her course in the direction in which she was lost. The result of the evidence on this point in my opinion is this:—That there probably was a current or tide setting to the southward between Pulo Panjang and the Great Carimon, but that a vessel navigated with ordinary care and skill could not have been carried out of her proper course by the force of this current without the deviation being perceived, and therefore that the *Charles Julie* could not have drifted to the shoal on which she was wrecked

except through the negligence or unskilfulness of the master and crew. HACKETT, J.
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Now the plaintiff contends that the departure of the vessel from the proper and ordinary course of the voyage was a deviation within the meaning of the covenant against deviation contained in the deed, and that for the breach of this covenant he is entitled to recover the principal sum of \$ 4,000 together with interest. And the question arises, was this departure from the ordinary channel in the voyage from Penang to Singapore, a deviation within the meaning of the covenant? I take it for granted, that I may assume that the covenant not to deviate contained in the deed, is to be construed in the same sense in which the condition not to deviate which is implied in Policies of Marine Insurance is understood.

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Now on referring to the text writers on Marine Insurance whose works I have been able to consult, I find the following definitions of the word "deviation." Park defines it as "a voluntary departure without necessity or any reasonable cause from the regular and usual course of the specific voyage insured." *Park on Ins.*, 8th ed., p. 619.

Marshall states: "By deviation is meant a voluntary departure without necessity from the usual course of the voyage insured." *Marshall on Ins.*, 4th ed., p. 138.

Arnold's definition is more full than either of these. He says: "The true proposition, therefore, is, that every voluntary and unnecessary departure from the prescribed course of the voyage, by which the risk is varied, is a deviation whether the risk be thereby aggravated or not." *Arnold on Ins.*, 3rd ed., p. 426. Further on he says: "Moreover it must be a voluntary departure from the usual course of the voyage in order to be a deviation; but it will be so considered although it takes place through the gross ignorance of the Captain," citing *Phynn v. Royal Exch. Ins. Co.*, 7 T. R. 505.

This last proposition is relied on by the plaintiff in support of his claim, and he contends that inasmuch as the *Charles Julie* departed from the proper and usual course of the voyage through the gross ignorance of the master, there was a breach of the covenant not to deviate, even although the master may have thought he was proceeding in the proper course.

But, in my opinion this is not a correct view of the author's meaning: the whole passage must be read together; and I think it is clear that the act done in ignorance which constitutes a deviation must be a voluntary act, and not a mere error of judgment. Nor does the case of *Phynn v. Royal Exch. Ins. Co.*, bear out the proposition contended for by the plaintiff. In that case a vessel bound from London to Jamaica was carried by currents and other causes, out of her reckoning until she was found to be between the Grand Canary and Teneriffe. From this point her direct course to Jamaica was to the South West, but the Captain bore up for Santa Cruz about 30 miles to the North West, where he came to an anchor. There the vessel was seized and condemned as prize.

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Here therefore we have a distinct voluntary departure from the proper course of the voyage after the master had fully ascertained his position, and from the report of the case, it seems to have been taken for granted, that although the master lost his reckoning and got out of his course, there was no deviation until having ascertained where he was, he voluntarily shaped his course for Santa Cruz.

But in the case before the Court, the master got out of his reckoning and never found out his mistake until after the vessel had struck; there was no intention on his part to go between the Carimons and Pulo Panjang, and therefore the case does not resemble the one just referred to.

There is another case which was referred to by the counsel for the plaintiff, that of *Tait v. Levi*, 14 East, 481, in which the captain of a vessel, insured to a port or ports on the Spanish Coast not higher up than Tarragona, went into Barcelona mistaking it for Tarragona. This case is cited as a case of deviation. But although there is a passage in Lord Ellenborough's judgment from which it appears that his Lordship thought this might be a case of deviation, yet in the opinion of the majority of the Judges of the Court it was not considered a case of deviation, because it was not voluntary, and the underwriters were held to be discharged on the ground that there was a breach of the implied warranty to provide a captain of sufficient knowledge for the purpose of the voyage insured. This case therefore rather supports the proposition that an involuntary departure from the ordinary course of the voyage through the ignorance of the master, does not constitute a deviation, and that to constitute a deviation the departure must be voluntary. And indeed it seems to me that any other doctrine would be attended with absurd results, and it would come to this, that in every case in which a vessel struck on a rock or sandbank through the ignorance and unskilfulness of the master, there would be a deviation inasmuch as such rock or sandbank must necessarily be out of the proper course of the voyage.

I am of opinion therefore that there has been no deviation in this case within the meaning of the covenant, not to deviate from the voyages stipulated and authorized by the deed, and that the plaintiff is not entitled to judgment on the 1st count of his petition.

The plaintiff further contends that, in any case he is entitled to recover on the count for money had and received, on the ground of a breach of the warranty of seaworthiness which must be implied in the contract; that this warranty not having been complied with, there was a total want of consideration and therefore that he is entitled to be repaid the money he has lent.

The grounds of unseaworthiness alleged by the plaintiff are three:—

First, the ignorance and incompetence of the captain; secondly, the insufficiency of the crew; and thirdly, the want of proper and necessary charts on board the vessel.

Now assuming a warranty of the seaworthiness of the ship to be implied in the contract between the parties, and that on the event of a breach of this implied warranty the plaintiff would

be entitled to recover back his loan on the count for money had and received, I proceed to consider the evidence on the various breaches alleged by the plaintiff.

First, as to the alleged incompetency of the captain. I quite agree to the contention on behalf of the plaintiff, that there is evidence to shew negligence or ignorance on the part of the captain, and that it is difficult to conceive how he could have got into the position in which the vessel was lost with ordinary care and a competent knowledge of his duties. And if this were the case of a British ship, prior to the 13 & 14 Vict., c. 93, upon the evidence I think, there might be strong reason for contending that the captain was not competent. This was so in the case of *Tait v. Levi*, which I have already mentioned, where the evidence shewed, that the Captain was incompetent and the underwriters were discharged. At the time, however, that case was decided, there were no requirements by the English law as to the fitness and capacity of masters, and it may be doubted whether since the Merchant Shipping Act, the question could well arise. By the Act, Marine Boards are constituted for the examination of masters and mates of foreign-going ships and of home-trade passenger ships. The examination is under the control of the Board of Trade, and when it has been passed, the Board of Trade grants to the applicants a "certificate of competency" either as master, first, second or only mate of a foreign-going ship, or as master or mate of a home trade passenger ship, as the case may be. If then this were the case of a British ship, all that, in my opinion, the Court could look to in any allegation of unseaworthiness on the ground of the master's incompetency, would be the "certificate of competency" granted under the provisions of the Merchant Shipping Act. [See *Merchant Shipping Act*, 1854, Secs. 135 & 136]. If the master were properly certified under that Act, I do not think evidence of his conduct would be admissible to shew that he was incompetent.

But this is not the case of a British ship. The *Charles Julie* was a French ship, built in France, with a French master and crew, and it is clear that any question as to the competency of the master or the sufficiency of her equipment generally, must be decided by the law of France. As *Willes J.* observed in *Lloyd v. Guibert* (L. R. Q. B., Vol. I., p. 127) ; "With respect to all persons, things and transactions on board, she was, as it were, a floating island, over which France had an absolute, and for all purposes of peace as exclusive a sovereignty as over her dominions by land."

Now what is the French law with regard to masters of merchant ships? There was no evidence adduced expressly on the subject, and the absence of such evidence may be accounted for by the fact of the plaintiff resting his claim mainly on the ground of the deviation of the vessel from her proper course. But there is evidence from which I think it may be fairly presumed that the requirements of the French law as to the qualifications of master, have been complied with.

A Commission was issued out of this Court to Marseilles for the examination of witnesses, and under that Commission, Captain Anglés was examined. He there stated "that he was a master

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HACKETT, J. "mariner for navigation on all seas; and that he had passed a
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"practical as well as a theoretical examination, after which a certificate of master mariner for navigation in all seas was granted to him in 1854." In a subsequent part of his evidence, Captain Anglés states that after the loss of the *Charles Julie*, and his return to France, "he passed, in compliance with the French law, before several Courts composed of competent men who have entirely absolved him, and have left him his certificate and the power to "continue to command."

Doubtless it would have been more satisfactory if the point had been properly raised between the parties, and the provisions of the French law established by proof in the usual way, but I must deal with the evidence as I find it, and considering that the evidence of Captain Anglés is not contradicted, I feel bound to presume that he is a properly certificated master according to French law, and therefore that in any question of seaworthiness, evidence of his conduct during the voyage cannot be adduced to prove his incompetency.

The second ground of unseaworthiness, alleged by the plaintiff is the insufficiency of the crew. The only evidence we have on the question of the sufficiency of the crew is, that of the master and the first and second mates of the *Charles Julie*. Captain Anglés states as follows:—"I had a mate, a second mate and a boatswain, and a crew of six . . . She [the vessel] was a three masted schooner, being so easily manned . . . I had only three square sails and all three at the foremast . . . They [the crew] were more than sufficient [to man the vessel] according to what I have just stated." Amedée Aubert, the mate, states: "We were ten hands altogether, on board. The officers were the captain, myself and the second mate . . . In difficult circumstances, besides the man at the cathead and the customary watch, orders were frequently given for some one to go up the masts." Félicien Perrache on this point says: "There was a sufficient crew for manning the vessel, considering the vessel was a three masted schooner and that the only heavy work was, in moving the square sails."

This being the only evidence in the case with regard to the number and sufficiency, it is clear that there is nothing from which I should be justified in assuming that the crew was insufficient.

The third ground of unseaworthiness alleged is, the want of proper and necessary charts on board the vessel.

From the evidence of Captain Anglés, it appears that the chart used on board the *Charles Julie* is the chart published under the direction of the Secretary of State for the French Navy, in 1862. A copy of this chart was produced before the Commission at Marseilles, and is the chart marked No. 2 in the documentary evidence. It is designated "Carte du Détroit de Malacca [Partie "Sud], depuis les North Sands jusqu'à Singapour, d'après M. M. "Wm. Rose, Robert Moresby et C. Y. Ward de la Marine Anglaise "de L'Inde," ["Chart of the south part of the Straits of Malacca "from the North Sands to Singapore, according to Messrs. W. "Rose, &c., of the Indian Navy."] From its title, therefore, the

chart purports to be the authorised chart of the portion of the Straits of Malacca in her voyage through which the *Charles Julie* was lost. And there is further evidence of this. The mate Amedée Aubert states: "The chart made use of, is the chart of the Straits of Malacca from the depôt of the French Navy," and Louis Honoré Gilette, a retired captain, describes the chart in question as "a new and more complete edition of the one published by order of the Minister of the Navy, which I used and which is used by French captains to go to Singapore. It enables me to see the navigation which is to be made in the Straits of Malacca."

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It would appear, therefore, that the chart used, is that published by order of the Minister of the Navy and used ordinarily by French captains.

But a chart was produced before the Commissioners on the examination of witnesses at Singapore, an English chart which appears to be a more complete chart than the French one, and it is contended on behalf of the plaintiff, that because the *Charles Julie* was not provided with a chart as perfect as this English chart, therefore she was unseaworthy. Now on examination of these two charts, it is clear that as compared with the English chart, the French one is imperfect, and must necessarily be less serviceable in navigating those waters. Besides it appears from the evidence of the captain and mate, that the place where the *Charles Julie* was wrecked was altogether out of the range of the French chart, which, therefore, at that point became useless, whereas the English chart which extends a third of a degree more to the southward includes the spot of the wreck.

But it seems to me that all that was requisite was, that the *Charles Julie* should have on board the chart stamped with the authority of, and prescribed by, the French law. It would be most unreasonable to hold that, as regards her equipment, a vessel should be governed by any other law than that of the state to which she belongs.

I am therefore of opinion, that the plaintiff has failed to establish the third ground of unseaworthiness, namely, the want of proper and necessary charts.

The result of the whole is, that there must be judgment for the defendant. [a]

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In order to establish an usage of trade, the evidence of men personally connected with the trade, and who have acquired their knowledge of its usage, not from hearsay, but from experience, is required.

There is no usage of trade, applicable to Straits trading vessels trading between Singapore and Penang, which permits of their touching in at Malacca, so as not to render it a deviation, when such vessel is insured only "for voyages between Singapore and Penang."

Straits owned vessels, plying between the Straits and ports outside the limits of the Colony, are not "Straits Traders," so as to be affected by Straits usage in trade.

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[a] Leave to appeal to the Privy Council was moved for and obtained on the 20th July 1868, but the appeal was subsequently withdrawn on motion of Counsel for plaintiff, on the 1st March 1869.

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v.
LEE CHENG
TEE & ANOR.

This was an action on a Chetty's Insurance Bond. The facts giving rise to it sufficiently appear in the judgment.

Atchison, for plaintiff.

Braddell [*Attorney-General*], for defendants.

Cur. Adv. Vult.

On this day judgment was delivered by

Maxwell, C. J. The petition claims to recover the sum of \$4,400 and interest upon a bond dated February, 1867. The condition of the bond recites that the plaintiff had lent to the defendants the sum in question on the hazard and adventure of the brig *Black Diamond*, on voyages to and from Singapore, Penang, Achin, Rangoon or Saigon for six months, and declares that the bond shall be void if the money is repaid with interest at 27 per cent. per annum in six months, or if the vessel is lost by sea perils within that time on any of the above mentioned voyages, *without deviation*. The *Black Diamond* was totally lost by a collision with a steamer; but she had called in at Malacca; it was indeed on her way to Singapore after leaving Malacca, that she was lost; and the question in dispute was, whether this constituted a deviation.

Mr. *Atchison*, on behalf of the plaintiff, relied on the general rule of law that every instrument is to be understood in the plain and common meaning of its terms, and that as the bond sued upon gave no leave to touch at Malacca, there had been a deviation.

The *Attorney-General*, for the defendants, contended that such leave was implied, first, because it was to be inferred from conversations between the parties before the execution of the instrument, and from the conduct and declarations of the plaintiff subsequently, that such was the intention; and secondly, because there was a general usage in the trade to which the *Black Diamond* belonged, for vessels to touch at Malacca.

The first ground cannot be supported on any recognized principles of law. It is an elementary rule that when parties put their agreement into writing in a shape which shews that they intend the writing to be the record of their bargain, it is not open to them to contradict or vary its terms by extrinsic evidence, when its provisions are in controversy between the parties to it, or some right arising out of it is asserted. The rule is that the document must speak for itself. It follows, therefore, in this case, that even if it had been clearly proved that the parties had verbally agreed, at or before the date of the bond, that the ship should be at liberty to touch at Malacca, she would not have been at liberty to do so if that permission was not to be found within the four corners of the instrument. If any such stipulation had been omitted by mistake, the only redress open to the party prejudiced would have been to get it rectified by a suit in equity. Again, conversations subsequent to the execution of the bond, shewing that the plaintiff knew that the vessel repeatedly went into Malacca, and that he was under the impression that she was at liberty to do so within the meaning of the bond, are equally unavailing to vary its language or affect the rights or liabilities of the parties. The words used must receive their interpretation without any regard to subsequent declarations by the parties as to

what they understood or intended to be in the contract, [except in the single case of a latent ambiguity,] for if the meaning of words could be thus varied, written instruments would have no other meaning than that which the parties chose to give them at any time. It is, indeed, allowable to vary or discharge a contract by a new arrangement, and this may, in some cases, be done verbally, or even by acts or conduct or course of dealing. As Bonnier pithily puts it, in his *Traite des Preuves*, you do not deny the voyage of a ship by asserting that she has arrived at her port of discharge. But it is not contended in this case that there was any such new compact, and for technical reasons, none could have affected the bond sued upon unless it had been under seal.

The other point was, that there was a known established usage authorizing the *Black Diamond* to touch at Malacca, and that the bond must be read as though that usage had been set forth in express terms in the document. Unquestionably, if any usage applicable to this contract had been proved, it would be considered as incorporated in it. The object of all exposition of written instruments is to ascertain the meaning and intention of the parties to them. This is, in general, accomplished by applying the rules of grammar to the words taken within ordinary and popular meaning. But if words have acquired a peculiar meaning in any locality or trade, persons making a contract in or with reference to such locality or trade, are presumed to use its language and also to intend to be bound by its usage, if either they belong to the place or trade, or are acquainted with its language and usages. Thus, it may be shewn by extrinsic evidence that in a lease of a rabbit warren, "one thousand" rabbits mean, by the custom of the place, twelve hundred; that "days" mean "working days" in a bill of lading, and that "years" mean "seasons" in a theatrical engagement, *Smith v. Wilson*, 3 B. and Ad. 728, *Cochran v. Retberg*, 3 Esp. 121, *Grant v. Maddot*, 15 M. and W. 737. So, in construing policies, the known usage of trade has always been freely invoked. "To understand the policy," said Lord Mansfield in *Gregory v. Christie*, "you must refer to the course of trade to which it relates;" and so here it is open to the defendants to prove that in the ordinary language of the trade with reference to which this bond was made, "a voyage from Singapore to Penang," means "a voyage from Singapore to Penang with liberty to call at Malacca." It was not pretended that Malacca is an usual port of call for all vessels passing between the two ports; but evidence was given to shew that it was usual for a certain class of vessels called "Straits Traders," owned, commanded and manned by Chinese, and plying simply between Singapore and Penang, to call at Malacca. Three or four owners of such vessels said that such was the practice of their own vessels, some say that they called whether full or in want of cargo, either to get the latest market news, or to enable the masters and men to visit their favorites; others, that they called only when the vessel was not full. Captain Smith, who has been connected with a different class of shipping in Singapore since 1850, spoke merely from what he had heard, and his belief was, that the vessels in question sailed straight

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to their destination when they were full, but that, when not full, they called in at Malacca for orders. Finally, Mr. Burn, the Master Attendant, said that the greater proportion of the clearances of the Straits traders was for Penang and Malacca, but that many cleared for Penang direct. I said, at the time, that I considered this evidence insufficient to establish a general usage; and for this reason, that to establish an usage of trade, the evidence of men personally connected with the trade and who have acquired their knowledge of its usage not from hearsay but from experience, is required; while here the Chinese owners scrupulously confined their testimony to the practice of their own vessels, or I ought rather to say, to the orders which they gave to their masters and to what the latter told them; and Mr. Burn and Mr. Smith had no personal experience whatever in the trade. But even if the usage had been proved, it was limited to "Straits Traders" plying between Singapore and Penang, and I am unable to see how it could apply to a vessel whose voyages were not confined to those limits. It is true, the *Black Diamond* had a Chinese owner, master and crew, and had traded between the two terminal ports of the Straits between October, 1866, and the February following, when the bond was executed, and had on every voyage called at Malacca [possibly with the knowledge of the plaintiff], though before that time she plied between Singapore and Saigon, subject to a contract between the same parties similar to that now in suit. Still the fact remains, that the voyages mentioned in the bond, and therefore in the contemplation of the parties when the bond was executed, were not mere voyages within the limits of the Straits, but voyages extending to Rangoon, Achin and Saigon, seems to me, therefore, that the contract was not made with reference to the Straits trade, and therefore that there is no ground for holding that its language should receive the meaning attached to it by usage in the Straits trade. Usage would have been imported into the instrument if it appeared that the instrument related to a mere Straits voyage, and that the *Black Diamond* was a known Straits trader. But to import it into a contract which does not relate to a mere Straits voyage, would be to attribute to the language a sense given to it not in the trade in reference to which the contract was made, but a different trade. This is out of the question. It follows that the terms must be used in their ordinary sense and as no leave to call at Malacca is to be found expressed in the bond construed in that sense, I must hold that the vessel in touching there deviated from her voyage.

Judgment for the plaintiff.

HOOGLANDT v. MAHOMED ISUP & ORS.

SINGAPORE.

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C. J.
1868.

May 15.

A memorandum for goods sold to the value of ten pounds or upwards, in order to satisfy the Statute of Frauds, must contain the names of the vendor and purchaser, the terms of the sale, the prices of the goods, and must be signed by the person to be charged [vendor or purchaser as the case might be]; otherwise no action can be maintained thereon.

A Solicitor who signs and sends a notice on behalf of his client, demanding delivery of goods sold, is not an agent for signing a contract of sale so as to bind his client and make the notice [which otherwise may contain all the requirements of the Statute] a memorandum with the Statute.

This action was brought to recover damages from the defendants for refusing to accept delivery of goods which they had contracted to buy of the plaintiffs. For the plaintiffs, one of them proved that the defendants had verbally contracted for the purchase of three hundred pieces of cotton printed goods, at 3 dollars a piece, upon three months' credit; and that the defendants refused to accept the goods tendered to them on the ground that they were not equal to sample. At the time of the bargain, an entry was made by the managing partner in a book, in the following form.

No. 590. Terms, three months.

Dated 7th November, 1867.

To Mahomed Isup, Mahomed Misa and Saiboo.

	170	} 300 pieces prints @ \$3.
S	173	
N C	174	
	184/6	

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and a delivery order was at the same time given to the defendants in the same terms, except that instead of the italicised word to, it was deliver to. The former document bore no signature. The latter bore the signatures of the three defendants on the back, written there some days after the contract, and with the view of getting delivery of goods. A letter signed by Mr. Davidson, the Solicitor of the defendants, and addressed to the plaintiffs was also put in, calling on the latter to deliver goods according to sample. On the close of the plaintiff's case,

Davidson, for the defendants objected, that the plaintiffs could not recover and must be non-suited, on two grounds, first that the contract laid in the petition was not proved, assuming that there was legal evidence of any contract, inasmuch as the petition described it as for the present delivery of goods and payable on delivery, whereas the evidence was that the delivery was to be at a future time, and payment not to be made until the expiration of three months; but secondly, that there was no memorandum of the bargain sufficient to satisfy the Statute of Frauds. The entry in the plaintiffs' book was manifestly no compliance with the statute, for it contained neither the names of the vendors nor any terms to shew that it related to a sale, and it bore no signature whatever, consequently was not, as the statute required, signed by the party sought to be charged or by his lawful agent. The delivery order was not a memorandum of any contract of sale, there was nothing on its face from which it could be collected that the persons to whom the goods were to be delivered were the purchasers of them. As to the letter written by him [*Davidson*], he was not his clients' agent for the purpose of signing any contract of sale, but besides the contract referred to in his letter was evidently not the one on which the plaintiffs sued, and at all events the letter was an insufficient memorandum as it made no mention of the price.

Maxwell, C. J., held, that the objection was fatal. The Statute of Frauds required that when goods were sold for the price of ten pounds or upwards, there should be a memorandum of the terms of the bargain signed by the party sought to be charged or by his

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thereunto lawfully authorized agent, if there was neither acceptance and receipt of the goods, nor something given in earnest or a part payment of the price. The Courts at home had always stretched the construction of the statute as much as possible for the ends of substantial justice, and he was willing to do the same; but it was impossible to get over the difficulties pointed out by Counsel for the defendants. There was no sufficient memorandum of the contract and no signature by the defendants.

Plaintiffs non-suited.

COLLINS v. BURN.

SINGAPORE. An action for damages will lie against a public servant, for acting in breach of his official duty, to the injury of any person.

MAXWELL,
C. J.
1868.
July 22.

The defendant, the Master Attendant or Shipping Officer at Singapore, it was alleged, refused to place the plaintiff, a duly qualified seaman, on the articles of a merchant vessel, as chief officer, whereby the plaintiff was unable to get the berth and suffered great loss.

Held, [if the evidence had supported the case,] that the action would lie.

The defendant advised the captain of a ship, who was about shipping the plaintiff as his chief officer, not to take him as such, on account of his previous conduct on board other ships, whereupon the captain changed his mind, and would not take plaintiff on.

Held, this was not an obstructing of the plaintiff from being engaged; and even if it was, was not done by the defendant in breach of his public duty, as it was no part of his public duty to advise the captain.

Held, further, if the plaintiff had any remedy for such statement made by the defendant, concerning him, to the captain, it was in a different form of action.

Query. Whether an action for slander or libel would lie, under the circumstances?

The duty of the Shipping Officer under section 4 of the Merchant Shipping [Indian] Act I. of 1859, is not to facilitate engagements for, seamen generally, but only in the way pointed out by section 22; and that is, not in assisting them to get employment, but to see they were not imposed on, when employment was offered them.

The plaintiff, in this case, was a Master Mariner; the defendant was the Master Attendant and Shipping Master of Singapore.

The petition stated, in the first count, that the plaintiff entered into an agreement with Edward Roberts, the master of the British steam-ship *John Bull*, to serve on board as chief officer, at forty dollars a month; that in pursuance of the agreement, the plaintiff and Roberts requested the defendant, as the Shipping Master of Singapore, to permit the plaintiff to sign the shipping article in his presence, and to attest the signature; but that the defendant, being such Shipping Master, without any reasonable excuse, refused; whereby the plaintiff lost his engagement.

The second count was similar, except that the ship was described as a foreign-going steam-ship.

The third count alleged that the defendant, being a Shipping Master under Act I. of 1859, for Singapore, did, contrary to his duty in that behalf, wrongfully obstruct and prevent the plaintiff from being engaged and shipped as chief officer of the *John Bull*, whereby the plaintiff was prevented from serving on board that vessel, and lost the wages and remuneration which would have accrued to him.

Davidson appeared for the plaintiff.

Atchison for the defendant.

The plaintiff, in his evidence, said that, on the 2nd May, he went to the Shipping Office with Captain Roberts, who requested Mr. Reutens, one of the clerks, to put his, Collins' name, in the articles as chief officer at 40 dollars a month. Reutens went into the next room with a paper in his hand, and then returned, directing the plaintiff to go to the defendant. Plaintiff went into the room, said good morning, and the defendant replied, that will do. The plaintiff walked out. Roberts was called into the defendant's room, the door of which was closed. Presently he came out and said to the plaintiff, he won't ship you. The plaintiff asked, why not, and Roberts told him to see the defendant. He did so; he asked him to allow him to be shipped on board the *John Bull*. The defendant said no; plaintiff asked why not, the defendant replied that he would give no reasons. It further appeared from the plaintiff's examination that he applied to Captain Playfair, the Colonial Secretary, and afterwards to the Governor on the subject of the defendant's refusal, and ultimately the defendant said that he had received a letter from the Governor, and that the plaintiff might go into any ship available.

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In cross-examination the plaintiff admitted that he had been convicted last January for not going to sea after signing articles, and had been sent to the House of Correction for four weeks for that offence; also that a little more than a year ago, he had shipped on board a Siamese barque, commanded by Captain Roberts, that he had received two months' pay in advance, and that the ship had sailed without him; but he said that he had joined her afterwards. He also said that Captain DeSouza had sworn articles of the peace against him in March, and that he had been committed to jail for some days for want of sureties.

Mr. Reutens said that Captain Roberts had asked him to allow Collins to sign the articles as chief officer; that he took Collins to the defendant, who asked to see Captain Roberts; and that when the latter left the office, he said to the plaintiff that the defendant would not allow him to be shipped.

The defendant said that he had a conversation on the morning in question with Captain Roberts. Upon being asked what was said,

Davidson, for the plaintiff, objected to the question, on the ground that what passed between the defendant and Captain Roberts behind the plaintiff's back was not evidence against him.

Atchison concluded that it was part of the *res gestæ*.

[*Maxwell*, C. J., said, that the plaintiff complained of having been obstructed in getting an engagement, and it was pretty obvious that whatever obstruction occurred, arose in the course of the conversation in question, but as the plaintiff objected to its reception, he would allow the objection.]

The defendant then proceeded to say that he had never refused to allow the plaintiff to sign any articles, nor had he refused to attest his signature.

He had never been asked to do either, he had never been asked by the plaintiff to allow him to join the *John Bull*, nor had he [the defendant] ever said that he would not allow plaintiff to join.

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Cross-examined by *Davidson*.—Reutens did tell him that Captain Roberts wished to ship Collins; he said nothing about articles; he said that Captain Roberts wished to have Collins as Mate of the *John Bull*. After Captain Roberts left the room, plaintiff came in and said that he [the defendant] had prevented his being shipped, and that he would not leave the office till he had satisfaction. The defendant requested him to leave the room, saying that he declined to have any conversation with him on the subject of the *John Bull*.

Captain Roberts, said that he went to the Shipping Office with Collins, on the 2nd of May, for the purpose of shipping him as mate, and that the defendant had *not* prevented him from shipping him.

In cross-examination, he said that, on leaving the defendant's office, he was not exactly willing to ship the plaintiff. He had not shipped him in consequence of what the defendant had told him. The defendant had not said he would not allow him to be shipped. He advised him [Captain Roberts] not to have anything to do with the plaintiff; that he would "give him the slip," and that he had done the same thing lately. He said to the plaintiff that he [Captain Roberts] could not ship him. The plaintiff asked why not, and the witness answered that he had better go and ask the Master Attendant. The witness further said that the plaintiff had given him the slip once; he had remained on shore after receiving two months' pay, eighty dollars. He had certainly served for two months afterwards, but that was to work out the two months' pay which he had received, and which Captain Roberts would otherwise have lost, and then he had left. He [the witness] had told the plaintiff on Sunday evening that he was willing to take him, and would keep the berth open for him; and even on the Monday he would have shipped him, but he happened to have gone to the Governor. On that day he saw his agents, and had some conversation with them. On Tuesday, he changed his mind, and became unwilling to ship the plaintiff.

Maxwell, C. J., in delivering judgment, said that the defendant was sued for a breach of his duty as Shipping Master, in refusing to let the plaintiff sign ship's articles in his presence and in refusing to attest that act, and also, for having, generally, obstructed the plaintiff and prevented him from being engaged on board the *John Bull*. To understand the case, it was necessary to refer to those passages of the Act 1 of 1859 to which Mr. Davidson had called attention in his opening. The 4th section declared that it was to be the duty of Shipping Masters, among other things, to superintend and facilitate the engagement and discharge of seamen in manner thereafter mentioned; and the 22nd section shewed what he was to do in respect of their engagements, *viz.*, to see that the articles were read and explained to the seamen before they signed, and to attest their signatures. This was a public duty imposed on him as a public officer and if he had acted in breach of his duty to the injury of any person, that person was entitled to bring an action against him for

the wrong. The first question, then was, had the defendant refused to let the plaintiff sign, or had he refused to attest the plaintiff's signature? Now, not only was there no evidence that he had ever been called upon to perform those purely ministerial acts, but it appeared very clear that the nature of the defendant's act was entirely different. What had led to the plaintiff not being shipped, was obviously the conversation between the defendant and the captain of the ship, and though the defendant's version of the conversation had been excluded, enough of it had been elicited from Captain Roberts by the plaintiff's counsel in cross-examination to shew what had taken place. The defendant advised Captain Roberts not to ship the plaintiff, observing that he would "give him the slip," as he had done once before, and as he had done since to somebody else; and Roberts said that on hearing this, he left the office "not exactly willing" to take the plaintiff as his chief officer. If this was really what occurred, and he [the Chief Justice] had no doubt about it, what prevented the plaintiff's engagement was not the refusal of the defendant to suffer the articles to be signed in his presence, but the disinclination of the captain to engage the plaintiff, induced, undoubtedly, by the defendant's advice. The plaintiff said that Roberts on returning to the outer office, said to him the defendant would not suffer him to be shipped. Captain Roberts' version of what he said was that he, Roberts, could not ship him, and when asked for the reason, told the plaintiff to ask the defendant. It was not material which version was the correct one; for it was plain that Roberts, on leaving the defendant, was unwilling to take the plaintiff as his officer, and that there never was a question about signing or attesting articles. It was true, that the following evening [Sunday] he was still willing to take him, and, indeed, he would have shipped him on Monday, but for the accident of the plaintiff being out of the way, having gone to the Governor to complain against the defendant. But this did not shew that the loss of the engagement, was owing to the defendant's refusal to do his duty as Shipping Master, it shewed on the contrary that Captain Roberts at that time was disposed to disregard the advice which had been given him by the defendant and that he, at least, had not construed that advice into a refusal to attest the articles. It was clear that there never had been any such refusal or anything equivalent to it, and therefore the plaintiff could not recover on either of the first two counts. As to the third count, it complained that the defendant, as Shipping Master obstructed and prevented the plaintiff from being engaged, and this was said to be a breach of his duty as defined by the 4th section of the Act. It was said that it was the duty of Shipping Masters, under that section to facilitate the engagement of seamen, and that, here, the defendant, had, instead of facilitating, obstructed an engagement contrary to his duty. Such was not the meaning of the Act. It would indeed have been strange, to find an Act requiring a public officer to use exertions to find engagements on board ships for all kinds of seafaring men, no matter what their character or qualifications might be. The 4th

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section did not require the Shipping Master to facilitate engagements generally, but simply to facilitate them "in manner herein-after mentioned," and what that manner was, was shewn by the 22nd section, which provided that he was to see that seamen who engaged to serve on board ships, understood the contract into which they were entering. In other words, his duty was not to assist them in finding employment, but to see that they were not imposed upon when employment was offered to them; and the only breach of that duty was a neglect or refusal to perform the simple ministerial acts of having the articles read and explained to the seamen, or of attesting his signature. If, therefore, the defendant had obstructed and prevented the plaintiff from getting an engagement, it was not by any breach of his public duty as Shipping Master, and the third count must therefore also fail. If the plaintiff had any cause of action against the defendant, it was for something done not in breach of his duty as Shipping Master, but wholly independently of his public character. It was for having said to Captain Roberts that the plaintiff would give him the slip, and he had lately been convicted of that offence, and for having dissuaded Roberts from shipping him. Whether the plaintiff was entitled to complain of this as a legal wrong done to him, it was not his duty to determine in this action. It was enough to say that the complaint here was simply that the defendant had injured the plaintiff by a breach of his duty as Shipping Master; it was plain that there had been no such breach and judgment must therefore be for the defendant.

MARTIN, DYCE & Co. v. HODGSON & Co.

SINGAPORE.

MAXWELL,
C. J.
1868.

August 17.

A warehouseman who undertakes to warehouse goods in a ship impliedly undertakes to use due care in keeping the ship in good condition and reasonably water tight; and also to have a sufficient number of hands on board to answer any emergency.

The fact that the warehouseman has placed such a number of hands on board, as is ordinarily to be found in other vessels, used for the same purposes, does not, of itself, relieve him from the responsibility, should the goods entrusted to him be lost. Nor is he relieved from responsibility by the fact that he has placed a reasonably sufficient number of men on board with express directions that they were not to be absent from the ship, and the men, in spite of his directions, wilfully absent themselves, leaving so few hands on board as to be unequal to meet an emergency.

The defendants, the owners of a hulk, received, for reward, certain quantities of gunpowder from the plaintiffs to be warehoused on board their hulk, they placed a European captain and four native seamen on board her, with express directions—they were not to be absent from the hulk at nights, three of whom, however, on the night in question, disobeyed the order given them, leaving two only of the men [natives] on board: the number of hands so placed by the defendant was the customary number placed on board other hulks similarly used. The hulk after taking in an extra quantity of gunpowder than usual, on the night in question, sprang a leak and sank with all gunpowder on board.

Held, the defendants were guilty of negligence, and liable to make good to the plaintiffs the value of gunpowder received from them.

The defendants' hulk, on the day of the night in question, took in certain quantities of gunpowder belonging to the plaintiffs from another hulk, but without the privity of the plaintiffs, and that night sank as stated above.

Held, the plaintiffs could not sue the defendants for negligence in respect of this quantity, as there was no privity of contract between them.

The facts of this case are fully set out in the judgment and need no further statement here.

Atchison for plaintiffs.

Cur. Adv. Vult.

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Judgment was now delivered by

Maxwell, C. J.—The petition states that in consideration that the plaintiffs delivered to the defendants certain gunpowder, to be safely kept by them and redelivered on request, for reward, the defendants promised to keep it safely and redeliver it; that the plaintiffs had requested the defendants to redeliver it, but that they had not done so.

The second count is to the like effect, except that the consideration is stated to be that the plaintiffs would deliver the powder to the defendants to keep, and this is followed by an averment that the powder had been delivered to the defendants accordingly.

The third count alleges that the powder was kept negligently, and was consequently lost.

The first two pleas put in issue the promise and the bailment. The third alleges that the defendants did keep the gunpowder safely; and the fourth states that the powder hulk *Princess Royal*, was a hulk moored near the limits of Singapore harbour, and used by the defendants for the storage of gunpowder for hire; that the powder in question was sent by the plaintiffs to the hulk to be stored and kept, was received, stored and kept by the defendants, who caused it to be safely deposited, and took care of it; and that before the plaintiffs demanded delivery of it, the powder was casually lost and destroyed by the sinking of the hulk by accident; by means whereof and from no other cause, and without any carelessness, negligence or improper conduct, or want of due care in the defendants, they were prevented from delivering the powder.

It was admitted that the quantity of powder claimed in the action had been received by the defendants; *viz.*, 2,712 piculs direct from the plaintiffs, and 788 piculs from the owners of another hulk, the *Statesman*, with whom it had been deposited by the plaintiffs, and that the whole quantity had been lost by the sinking of the *Princess Royal* on the night of Sunday, the 16th February last.

The first and most important question is, whether the defendants are liable for this loss; the second, whether, if they are, the plaintiffs are entitled to recover in this action the value of the powder received from the *Statesman*, as well as of that received from the plaintiffs directly.

To take the second question first, I think it must be answered in the negative. There was no privity of contract between the plaintiffs and the defendants in respect of the powder delivered by the *Statesman*; and there being no contract between them, the defendants cannot be sued for a breach of any. But, Mr. Atchison asked for leave to add a count in trover; and in exercise of the power which the Charter gives to the Court, of amending the pleadings, and which I have always freely exercised whenever I thought that the ends of substantial justice required it, I should

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probably not have refused the application upon terms, if such a count would clearly be sustainable. But it seems to me that this is not a mere question of pleading, but that the plaintiffs could not recover from the defendants in any form of action, compensation for the loss of this powder. There was no conversion of it by the defendants. It has often been decided that if a carrier misdelivers a parcel, trover lies against him for the wrongful act, see for instance, *Stephenson v. Hart*, 4 Bing. 483; but it was held in *Ross v. Johnson*, 5 Burr. 2827, that trover would not lie against a wharfinger for goods which he had lost. "In order to maintain "trover," says Lord Mansfield in that case, "there must be an injurious conversion. This is not to be esteemed a refusal to deliver the goods. They can't deliver them. It is not in their power to do it." Mr. Atchison cited a passage from Addison on Torts, p. 222, to the effect that if goods are bailed by A. to B., to be kept by the latter, and B. bails them to C., who uses and wastes the goods, C. is liable at the suit of A.; and he referred also to Story on Bailments (Sect. 105), where it is said, that if a bailee delivers the goods bailed to him, to a second bailee, the original bailor is entitled to demand and recover them from either bailee. Both passages I take to be sound law; but they apply to cases where the second bailee has, in legal effect, converted the goods to his own use, either by wasting them, or keeping them in his possession after demand. In the present case, it seems to me that whether the defendants be liable to the owners of the *Statesman* or not, they are not so to the plaintiffs.

The determination of the first question depends on whether the defendants were guilty of negligence in keeping the goods committed to them. As warehousemen, they did not warrant or ensure the safety of the powder against all risk, but they undertook to bestow care in keeping it; and if they failed in bringing to the duty so undertaken the degree of care which they were bound to bring, the breach of that duty is negligence, and they are responsible to the plaintiffs for the loss sustained in consequence. It is impossible to lay down *a priori*, with sufficient accuracy to answer any practical end, what degree of care it is incumbent on a bailee to exercise in different cases. In the old civil-law division of negligence, into the three degrees of slight, ordinary and gross, warehousemen are responsible not only for "gross" but for "ordinary" negligence; but these expressions tend, perhaps, rather to confuse than to convey an accurate idea of the extent or limits of their responsibility; and the division of negligence into degrees has been in recent times regarded by our Superior Courts of law as useless for all practical purposes; *per Rolfe B.* in *Wilson v. Brett*, 11 M. & W. 115; by the Court of Queen's Bench, in *Hinton v. Dibben*, 2 Q. B. 661; and by the Court of Common Pleas in *Austin v. The Manchester, &c., Railway Co.*, 10 C. B. 454; and the same opinion has been expressed by the Supreme Court of the United States in *The Steamboat New World v. King*, 16 Howard 469. It is better therefore to drop the expressions "ordinary" and "gross" negligence, and to say simply that the defendants are liable, if they have been guilty of "negligence," which is simply

the absence of such care as it was their duty to use; *per* Willes, J. in *Grill v. The General Iron Screw Collier Co.*, L. R. 1 C. P. 612.

Now, as I understand the law on the subject, bailees for hire, that is, persons who undertake, in consideration of reward, to do something with the goods entrusted to them by those who employ them, whether it be to bestow work in improving them or care in keeping them, impliedly undertake and contract to bring to their task an adequate knowledge of their business, and the application of what may be called business—like or professional skill, diligence and care in its performance. If a man carries on the business of a watch-maker or jeweller, he holds himself out to the world as possessed, and impliedly contracts with those who employ him that he is possessed of the qualifications reasonably requisite for the due performance of the task which he undertakes in his business; and a warehouseman does the same. No express contract is required to impose this obligation on him; he assumes it by the public profession of his trade, or business or art or profession. He impliedly undertakes to bring to the keeping of the property which has been entrusted to him, in consideration of the reward which he receives, an adequate knowledge of the business of safely keeping goods and a due amount of skill and care in keeping them, in the same sense and degree as the watchmaker or jeweller who undertakes to repair a watch or set a gem, would be required to bring to the work to be done on the thing delivered to them, and to its preservation from loss or injury. The care, again, must be proportioned to the nature of the thing which is bailed, and to the extent of the injury likely to be sustained through the want of such care; *Story Bailm*: section 15. Thus in the carriage of passengers for hire, coach proprietors and railway companies are bound to carry safely, as far as human care and foresight will go, *Christie v. Griggs*, 2 Camp. 79, *Readhead v. The Midland Railway Company*, 2 L. R. 2 B. 412. On the other hand “a man would not be expected to take the same care of a bag of oats as of a bag of gold; of a bale of cotton as of a box of diamonds; *Story*, section 15;” and for the simple reason that it is found by experience that different degrees of care answer the same end in the different cases.

One other proposition of law it is necessary to state. A master is responsible for the negligence of his servant in the course of his employment. Thus, if goods on board a ship are lost by the negligence of the captain, the owners are responsible, *Ellis v. Turner*, 8 T. R. 53, *Boson v. Sandford*, 3 Leo. 258. If the portmanteau of a passenger in a cab is lost by the negligence of the driver, his master is bound to make it good, *Powles v. Hider*, 6 E. & B. 208. And it makes no difference that the misconduct of the servant was in disobedience of his master's orders; *Limpus v. The London Omnibus Company*, 32 L. J. Ex. 34. The rule of *respondet superior*, it is said by the Supreme Court of the United States or that the master shall be civilly liable for the tortious acts for his servants, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent or deceitful. If it be done in the course of the employment, the

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master is liable; and it makes no difference that the master did not authorise or even know of the servant's act or neglect; or even if he disapproved of it or forbade it, he is equally liable, if the act [or neglect] be done in the course of his servant's employment; *Philadelphia and Reading Railroad Company v. Derby*, 14 Howard 468. The criterion is not whether the master has given authority to the servant to do [or omit] the particular act, but whether the servant does [or omits] it in the ordinary course of his employment, *per cur.* in *Seymour v. Greenwood*, 30 L. J. Ex. 192. If, then, in this case, the captain or men were guilty of negligence in the course of their employment, even in disobeying their orders, the responsibility must fall on their masters. In a word it was not convenient to the defendants to discharge in person the duty which they had undertaken; they employed others as their servants to do it, and if servants were guilty of negligence in the course of their service the defendants are responsible for it.

Although the trial of this case lasted several days, the fact may be briefly stated. The powder hulk *Princess Royal* of 913 tons, was bought by the defendants in 1864, for 6,000 dollars, and about 5,000 dollars were subsequently expended on her. She was repaired in 1865, caulked and covered with zinc up to 14½ feet, and, as far as her timbers were examined, she appeared in every respect sound, and apparently well calculated to serve as a hulk in Singapore harbour for five years, at the end of which time fresh repairs would have been necessary. She was moored in seven fathoms of water, in the usual way, by two anchors from her bow, with a swivel, eight-tenths of a mile from Tanjong Katong, just beyond the limits of the harbour, about two cables length or a little more, from the two fathom bank, which was between her and the shore, and 2½ or 3 miles from the jetty or mouth of the river. She made very little water, needing to be pumped [for half an hour] only twice a month; or indeed, I think one of the men said, only once in two months, when there was no rain. She was provided with two good and suitable iron pumps of 8½ inches diameter; and the captain says that it was the practice to sound the well once or twice in the day, and three times at night. She had, at the end of 1866, as much as 11,000 piculs [of 100 lbs.] of gunpowder stowed in her; but in 1867 the largest quantity on board at any one time was 3,570 piculs. On Thursday, the 13th of February, she had between 4,200 and 4,300 piculs on board; and with that cargo she drew about 12 feet. She was manned by an English captain, Mayo, and four Boyans, not seamen, but boatmen or coolies, whose duty it was to keep the ship clean, to keep watch and sound the pumps at night, and to man the boats when necessary. Among the regulations laid down by the defendants for the captain and crew, was one which prohibited the European officers to be out of the ship after sunset without their written consent, and required that three-fourths of the crew should always be on board. I mention this regulation, however, merely for the purpose of saying that it does not follow that because the owners might justly complain of a breach of it as negligence, as between themselves and their servants, the plaintiffs are therefore entitled

to treat such a breach as negligence, as between themselves and the owners. In this cause, the regulation is evidence only of the prudence and care of the defendants on the point to which it relates.

In the course of Thursday, the 13th of February, another powder hulk, the *Statesman*, came along side of the *Princess Royal* and on Friday and Saturday transhipped into her 2,005 piculs, so that on Saturday afternoon, at 4 o'clock, she had a cargo of between 6,200 and 6,300 piculs, and the additional weight, about 120 tons, sank her in the water 1 foot or 1 foot 2 inches deeper. It blew fresh on Saturday, and between 2 and 3 p.m. the wind increased. There was a nasty sea on, to use the expression of Captain Mayo, and the vessels occasionally touched, but they were separated from immediate contact by fenders. At about 5 p.m. they separated; at 7½ p.m. Captain Mayo sounded the well and found about the usual quantity of water, seventeen inches, which, he says, it was not worth while to pump out. He then got into his boat with two of the four Boyans, pulled round the vessel, found nothing wrong, and pulled ashore. It was 8 p.m. when they left the ship; and they did not return to her until 9 p.m. on the following day, so that the hulk was left in the charge of two Boyan coolies or boat-men for a considerable space of time.

What passed on board during that time is left in great obscurity. Captain Mayo and Captain Smith, one of the defendants, say that at 3 p.m. on Sunday they looked at her from Tanjong Pagar through an opera-glass, and that she appeared to them to have two feet, according to Captain Mayo, or 1½ feet according to Captain Smith of her zinc above water, which would make her draft 12½ or 13 feet. But they do not say that they paid any special attention to this matter, and I cannot believe that at the distance at which they were, between three and four miles, as I infer from the chart, they could have distinguished this with anything approaching to accuracy through an opera glass. At the same time, I have no doubt that they noticed nothing in her draft or trim at that time, to alarm either a master or an owner. The two Boyans left on board, concur in stating that the quantity of water usually in the well was 12 inches, but that on Saturday afternoon it rose to 15, when the vessel was pumped. In these particulars they are at variance with Captain Mayo. They say also, that they sounded the well on Sunday morning, and again at noon, and on both occasions found 15 inches; and that they sounded a third time at 5 p.m. with the same result. At this hour, a squall came off Tanjong Katong, blowing from a little to the westward of north. They describe it as a sharp or high wind with waves; Mr. Waller says that he was prevented by it from coming to town from Tanjong Katong in a Chinese sampan, or boat pulled by one man; while another witness, Mr. Simmons, the master of a vessel in the harbour, spoke of it as a "little squall," and as "nothing to prevent one from going ashore." I see no reason for believing that it was of an extraordinary nature, or of unusual severity. It subsided at 6 p.m., but the sea continued heavy for the rest of the night.

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At 6 P.M., the men say, they sounded again, in consequence of the wind, and then they found the quantity of water to be, according to Ahman, 17, but according to Mahomed, 25 inches. They concur in saying that they at once went to the pumps and pumped incessantly according to the one, for an hour, and according to the other, for half an hour, and that they then sounded again, and found the water to be, one says 34, the other, 25 inches. Finding that the water was gaining on them, they left the ship, pulled to the *Statesman*, where one of her crew, Sabtu, joined them, and thence pulled slowly, against the tide, to the beach of Campong Glam, about a quarter of a mile from which Mayo lives, Mayo was not at home; Mahomed walked then to Tanjong Pagar where Mr. Smith lives, and walked back to Campong Glam, and near the French Church he met Captain Mayo, who went off at once to the hulk, which he reached at 9 P.M. He found Captain Platel of the *Statesman* already there with some men, and it is probable that Captain Platel had arrived there an hour earlier; he sounded the well and found that the vessel had between 14 and 15 feet of water. The pumps were worked, and the bell was rung to give the alarm, and powder was thrown overboard to lighten the hulk; but at 9.50 P.M. she descended into the water some 8 or 9 feet, up to her bulwarks, and continued in that state, water logged and gradually sinking, until 7 o'clock on Monday morning, when she finally went down. The man-of-war steamer, *Perseus*, of 975 tons, one or two tug steamers, perhaps other steamers also, and about 30 or 40 square-rigged European vessels were in the harbour, on the night of this occurrence. Captain Mayo remained near the hulk during the night. Captain Smith, who arrived a little before 10 P.M., just as she was descending into the water, remained there also for an hour and a half, and then returned to the shore. After 5 A.M., on Monday, he returned to the hulk, when only part of her roof was visible. He then went to Sandy-point and engaged two lighters and a hundred Kling coolies. It was then a quarter to seven. He then proceeded to the Mohr tug, which was lying in the harbour; she got up steam and reached the wreck at 10 A.M. But it was then too late.

Under these circumstances, then, the question arises, whether the loss sustained by the plaintiffs was owing to the want of due care, or in other words, to the negligence of the defendants. It seems to me that a warehouseman, in contracting to use due care in the keeping of the goods of others, impliedly undertakes to use due care in keeping the premises in which they are stored, in good and proper condition and repair. If he allowed them to fall into decay, and by reason thereof the rain entered and damaged the goods, or the house tumbled down and destroyed them, I think that he would clearly be responsible to his bailers for the loss thus incurred. So, if his warehouse is a ship, he impliedly undertakes to use due care in keeping her in good condition and reasonably water-tight. Without doing so, he could not perform his contract to keep the goods with due care. I think, then, that the defendants, though they did not contract to indemnify the

plaintiff against all loss arising from inevitable accident to the hulk did contract to use all reasonable and proper means, and precautions to guard her against at least all known and probable dangers threatening her. In *Leck v. Maestaer*, I. Camp. 138, Lord Ellenborough held that a bailee for hire should be prepared to meet not merely ordinary, but unusual and unexpected hazards. There, a shipwright who had a vessel in his dock for repair, was held liable for the injury done to her by an extraordinary high tide, which burst the dock gates, because he had not a proper number of men in the dock at the time, to take measures of precaution when the danger was approaching. The soundness of that decision was said to be questionable, but it has been repeatedly cited without disapprobation, as far as I know, and no Judge sitting in this Court would venture to disregard the opinion of Lord Ellenborough, even *nisi prius*, without weighty authority to support him. That case, however, was a much stronger case than the present. There, the danger was not only unexpected but extraordinary; here the danger was known and expected; it was, that the hulk should spring a leak. A knot hole or a worm hole, or the starting of a butt or whole plank, or the carrying away of the forefoot by over-riding the cable, were mentioned, in the course of the trial, by the defendant, Captain Smith, and other witnesses, as instances of the manner in which leaks may suddenly be sprung. Besides, sooner or later, in the inevitable course of things, by wear and tear and decay, a vessel must spring a leak one day if not watched and repaired in due time, as surely as the roof of a house will one day leak if it is not attended to. It is true, the leak was not expected at the time when it came; the hulk was very dry, and on Saturday it betrayed no sign of the danger, according to Captain Mayo; but still a leak was a thing to be guarded against, and to be guarded against with due and reasonable care. This, indeed, would not be questioned by the defendants, who had for that purpose provided the vessel with suitable pumps, and had ordered soundings night and morning. But was this enough? Was it enough to provide for the detection of the danger, without making adequate preparation to meet it when it came? And if not, was adequate preparation to meet it, made by the defendants? If it was, they did their duty; if it was not, they were guilty of negligence.

It was said that a master and four men were adequate for this purpose, having regard to the circumstances of the hulk, and to the practice of other hulks in this and other harbours; and a passage from *Story on bailments* was cited (sec. 14) to the effect that in considering the question of negligence, the customs of trade, the course of business and the state of society had an important influence. Within due limits the remark is sound; but it cannot be pushed to the extent of establishing that there can be no negligence when a general practice is followed. To take one of *Story's* illustrations; if it is found in any particular place, that coals may be left on a wharf unprotected and unsecured, or a chaise may be left in an open shed, at night, without tempting the cupidity of the dishonest, it would not be negligence to omit

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precautions which long experience tended to prove unnecessary. And this depends on the same principle as that on which it would be held that it was not negligence to keep oats in a bin and under a common padlock, while it would be great negligence to make no better provision for the security of plate or treasure, experience teaching that that which is an adequate obstacle to dishonesty in the one case, is wholly inadequate in the other. But cases of that kind have no application here; cases like that of *Siordet v. Hall*, 4 Bing. 607, are more analogous. There the owners of a steamer were held liable for the act of the captain in filling the boiler, overnight, in the month of February which led to the pipe being cracked by the frost; and it was held no defence that the same practice had long been followed in the same vessel, and was generally followed on board other steamers. It was well known that frost would rend iron, and previous immunity from injury did not justify the practice. So here, the mere fact that with four native men and one European officer no accident had hitherto occurred, and that other hulks were not more strongly manned, would not, in my opinion, be conclusive in disproof of negligence. It would be more pertinent to show that in a similar emergency the same number of men had been found equal to it. But I am not called upon to determine whether a captain and four men were enough. In *Leck v. Maestaer* the question was not whether the ship builder employed a sufficient number of men, but whether he had a sufficient number at hand to meet the danger when it came. So here, the question which I have to consider, and would have to consider if the crew had been ten times as strong, is whether there was due care in leaving the vessel and her valuable cargo, in the charge of two Boyan boatmen for 25 hours. And to that question I can give no other answer than that it was not; and consequently that there was negligence for which the defendants are responsible. I think that due care and prudence required that the vessel should always have on board not only a man of sufficient intelligence, experience and judgment to detect a leak at an early stage, and to take at once the best measures for meeting it, but also men enough to enable him to do so, either by their own exertions, or by procuring external aid, according to circumstances. A few would suffice if other assistance could be counted upon; many more, if it could not. But I do not think that there was due care in leaving the vessel in the charge of Mohamed and Ahman, who even if they were competent enough to detect and appreciate the danger quickly, were obviously unequal to meet it themselves, and appear to have had no other idea or instructions as to what they were to do in such an emergency, than to go to the town for the captain. If, as was suggested, the European masters and seamen of the vessels in the harbour would have paid no attention to the appeals of two native boatmen for help, it would be but illustrative of the negligence of leaving the hulk in the sole keeping of such hands.

It was said, however, that even if there was negligence in this respect, it was not made out that it caused any loss which would not otherwise have happened; that if the vessel had had its

captain and four men when the leak was discovered, she could not have been saved, that no pumping could have kept her afloat for any material length of time; that it would have been impracticable to get coolies; that no boats could have been procured owing to the habits of intoxication of European crews on Sundays, and that if they had been, they could not have towed the hulk to the Tanjong Katong beach, or even to the two fathom bank; that no lighters could have been obtained in time; that tug steamers might not have been available, as they might have been unprovided with coal, and their masters and engineers might have been on shore; and even that it might have been impracticable to unshackle or slip the ship's cable. I think it unnecessary to examine the evidence on these various topics; and I will merely observe that most of it was conjectural or otherwise vague, and that some of it was contradicted by the facts actually proved, such as the difficulty about getting coolies, by the fact that Captain Platel and Mr. Mayo had procured 40 in a very short time, and that several boat-loads more arrived at 10 p.m. But if I were to give it implicit credit, it would not lead me to the conclusion which the defendants would desire; for I should be led to inquire whether, in a port where external aid was notoriously not to be expected from the shipping or the town on a Sunday, the defendants had acted with due care in leaving their hulk and its valuable cargo, on that day, in the keeping, I will not say of two coolies, but even of their full compliment of an European master and four native boatmen. Certainly, that crew was sufficient, it was not because they were, themselves, equal to meet the emergency of the ship springing a leak, but because help might with reasonable certainty be calculated on within a reasonable time, having regard to the circumstances of the place. But if this was not so, if it was notorious that on Sundays no help was procurable, the question would arise whether it was taking due and proper care of the plaintiffs' goods to leave them, one day in every seven, in such a position that if a leak occurred, the hulk in which they were stored must inevitably go down at her moorings. It might justly be asked, whether, in such circumstances, it was not the duty of the defendants, in fulfilment of their contract to keep with due care the plaintiffs' goods, to take extraordinary precautions, every Sunday, for the preservation of the property entrusted to their keeping, either by manning her so powerfully, and providing her so well with boats and other requisite appliances, as to enable her to meet with her own resources, the dangers which she had to guard against, or to make special arrangements for immediate assistance from shore. But I am unable to believe that with a man-of-war and 30 or 40 European vessels in the harbour, with numbers of lighters two or three miles off, and with a large population of labouring and seafaring men in and about the town and shore, to whom Sunday is not a day of rest or relaxation, no material aid could have been obtained to save the hulk. Unfortunately, no attempt was made to obtain any, and while making every allowance for the state of mind of Captain Smith, when he found himself, on that evening, under the blow

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of an overwhelming disaster, I am bound to say that if application for help had been made when the leak ought to have been first discovered, the hulk and cargo, or at all events the latter would, I believe, have been saved.

I am inclined to believe that the leak began much earlier than the Boyans say, considering that the sides of this old vessel which had been exposed to sun and rain and wind for the preceding twelve months were on Friday and Saturday submerged to the depth of a foot, and that the increased depth must have materially increased the strain on her I think it probable, also, that it was discovered by the Boyans earlier than they say. The regulations only required that the pump-wells should be sounded night and morning; and yet those men, according to their account, sounded on Sunday not only in the morning, but again at noon, and again at 5 P.M., and a fourth time at 6 P.M. Does not this frequent sounding indicate some uneasiness about the ship, or to speak more precisely, some uneasiness about the quantity of water in her? For my part, I do not believe that those dull :pathetic men would have been so curious about the state of the well, if there had not been some adequate cause. But the story may not be true, and at all events I cannot attach implicit belief to it. However, I think that they did sound at 5 P.M.; that they had then a stronger ground of apprehension than the squall which was just beginning, and that they found then good reason for again sounding at 6 P.M. I think also that the leak had made greater progress than 25 or 34 inches when they left the ship, which I think, must have been rather earlier than they admit, not only because I doubt whether they would have worked at the pumps incessantly for an hour or even half an hour, as they say, but because they could not have returned to the ship as early as 9 P.M., if it was much after 6 P.M. when they left, considering that they first pulled to the *Statesman*, then slowly against the tide to Campong Glam, and then walked to Captain Mayo's house, $\frac{1}{4}$ of a mile off, then to Tanjong Pagar, which can hardly be less than two miles, and then returned to Campong Glam, before taking again to their boat. But assuming that the leak was discovered only at 5 or even 6 P.M., I think that if Captain Mayo or any other experienced seaman had been then on board with men enough to keep the pumps going, and to man a boat to go to town for help, giving the alarm to the shipping, and especially to the man-of-war, on their way, men and boats and kedges would have been procured, sufficient to tow or warp the bulk to the beach of Tanjong Katong, or at least to the two-fathom bank which was only some three hundred yards off, and so the plaintiff's goods would have been saved. I think it probable also that the tug steamer and the two lighters whose services were put in requisition too late on the following morning, might have been brought to the scene in good time to save her. From Captain Smith's evidence, I gather that the tug could not have been more than two hours in getting up their steam on Monday morning and even if the master and engineer had been on shore on Sunday, I think that the defendant,

Captain Smith, would have found no great difficulty in having her fires lighted and her boiler filled, while they were being sent for; and in this case she would have been on the scene before 9 p.m., But even the delay of another hour or two would not have been material, for if the ship's pumps had been efficiently manned in the meantime, she would have been kept afloat till a much later hour.

I come, then, to the conclusion that the plaintiffs have established their case, and that their goods were lost through the absence of that degree of care which it was the duty of the defendants to give to the safe keeping of them.

The damages assessed at \$26,689.

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W. E. MAXWELL v. CHETTYAPAH CHETTY.

Although it is a rule that there can be no passing of property in a chattel, except by delivery or deed, [a] yet this has no application to contracts made in respect to chattels, for valuable consideration: and therefore there may be a mortgage of a chattel without deed.

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In the absence of a stipulation to the contrary, a mortgagee is entitled to immediate possession of the property mortgaged, until his debt is paid: and if he sell the property, whether he then had the right to do so or not, such sale does not revert the right of possession to such property, in the mortgagor, so as to enable him to sue in trover, as long as the debt remains unpaid.

This was an action of trover for a carriage. The defendant among other things pleaded by way of equitable defence as otherwise, that the carriage had been mortgaged to him by the plaintiff's intestate by an informal document [set out in the judgment] and that default had been made by him and the plaintiff as his administrator, in payment of the monies due thereon, whereupon he took possession of and sold the carriage, which was the conversion complained of. The facts appear sufficiently in the judgment.

The plaintiff [in person] cited *Harris v. Birch*, 9 M. & W. 591; *Franklin v. Neate*, 13 M. & W. 481; *Irons v. Smallpiece*, 2 B. & Ald. 551; *Attack v. Bramwell*, 32 L. J. Q. B. 146; *Edmonstone v. Nuttall*, 34 L. J. C. P. 102; *Johnston v. Stear*, 33 L. J. C. P. 130; *Brierley v. Kendall*, 17 Q. B. 937; *Coggs v. Bernard*, 1 Sm. L. C., p. 171, ed. 5.

B. Rodyk, for defendant, cited *Reeves v. Capper*, 5 Bing. N. C. 139; *Flory v. Denny*, 7 Exch. 581, S. C. 21 L. J. Exch. 223; *Donald v. Suckling*, 1 L. R. Q. B. 585; *Story Eq. Jur.* §. 1031; and *Halliday v. Holgate*, 3 L. R. Ex. 299.

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October 7. *Hackett, J.* This is an action of trover to recover the value of a carriage. The plaintiff is the administrator of one Nallah Mahomed, deceased. The facts appear to be as follows: In January, 1863, the plaintiff's intestate borrowed money from the defendant and gave him certain papers as a security for the loan. On the 29th February, the intestate died, and about the 20th of April, the defendant sold the carriage, and it is for this act that the action is brought.

[a] See however, *Danby v. Tucker*, 31 W. R. 578.

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Defendant sets up his title as mortgagee and claims a right to sell, under the promissory note of the 1st February.

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The promissory note was as follows :

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"I Nallah Mahomed promise to pay to Chettyapah Chetty or order the sum of Spanish Dollars fifty [\$50] payable by monthly instalments of the sum of Spanish Dollars Six [\$6]. if default should be made in paying any of the said instalments the whole shall become immediately due and payable. and for better securing the repayment I hereby mortgaged to the said Chettyapah Chetty one carriage No. 92, and one black pony with harness complete."

The plaintiff on the other hand, maintains that there was no mortgage, because the promissory note was not an instrument under seal, and no property in a chattel can pass without delivery unless the gift be by deed, and in support of his argument he cites the case of *Irons v. Smallpiece*.

Now this is no doubt perfectly true with regard to *gifts* of chattels which are invalid without a delivery of possession, in the same way as a *donatio mortis causa* passes nothing unless the gift be completed by delivery, but it is not so in the case of a contract where there is a valuable consideration. Otherwise no contract for sale of goods would be binding unless there were actual delivery of the goods.

The case of *Flory v. Denny* shows conclusively that the mortgage of a chattel may be made without deed. I am, therefore, of opinion that this objection cannot be sustained.

Then comes the question does this promissory note or agreement amount to a mortgage? The document is certainly a most informal one and contains none of the proper or usual words of assignment. It only contains the words "mortgage," and that too is used [no doubt by mistake] in the past tense. Now properly speaking "mortgage" is a word expressing in law the effect of an assignment or conveyance of a particular kind, and is never used by lawyers to express the act of assignment. But here I have a document drawn by an unpractised hand and I am to endeavour to extract the real meaning of it. If the parties, from ignorance, failed to use the proper or usual words, am I to say that their contract is not to be carried into effect? I think not. If the Court is satisfied from the document itself that the parties intended to make a mortgage, I think it is bound to effectuate their contention although perhaps the most correct and grammatical language may not have been used.

In this case, I think, it is clear from this note that the intention of the parties was that the palanquin and pony should be mortgaged to the defendant as a security for his money, and I consequently feel bound to hold that the palanquin was in fact so mortgaged.

The next question is, what were the rights of the defendant in the events which have happened. Had he a right to sell, and if he had no right to sell, can the plaintiff maintain his action for the conversion of the goods?

Now the terms of the note are, that Nallah Mahomed shall pay off the loan by monthly instalments of \$6, and that in the event

of one monthly instalment being unpaid, then the whole amount shall become payable. Ordinarily speaking, in assignments by way of mortgage there are stipulations as to the circumstances and conditions under which the mortgagee shall be entitled to take possession of and dispose of the mortgaged property. Here there are no such stipulations, and we have the bare fact of the mortgage to the defendant without anything more.

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Now in the absence of any stipulation to the contrary, a mortgage would entitle the mortgagee to immediate possession of the mortgaged property. A mortgage is an assignment of the property in anything subject to a condition or proviso that if the debt is discharged by a certain day the transfer should be void, and the only right remaining in the mortgagor [unless there are provisions for his retaining possession of the mortgaged property, in which case he may be a lessee] is his right of the equity of redemption. In this case, therefore, there being nothing stipulated to the contrary, the defendant had a perfect right to the possession of the mortgaged palanquin until his debt was satisfied.

Then the question comes had the defendant a right to sell? and if he had no right to sell does the act of the sale operate so as to revest the right to the possession of the mortgaged property in the mortgagor or his representatives? I think not. At law the title of the mortgagee to the possession of the mortgaged property is absolute unless there be some special clause in the mortgaged deed by virtue of which the mortgagee is entitled to claim possession, and even in the case of a pledge in which the property does not pass, it has been held in the case of *Donald v. Suckling*, and the recent case of *Halliday v. Holgate*, that the pledger is not entitled to bring trover as long as the debt for which the property was pledged as security remains unpaid. *A fortiori*, this must be so in the case of a mortgage in which the legal estate in the mortgaged property is vested in the mortgagee, and the only right or interest remaining in the mortgagor is the equity of redemption.

I express no opinion here as to whether the sale was regular or otherwise. It is laid down in the books that the mortgagee of a chattel may sell on giving notice to the mortgagor. In this case at the time of the seizure and sale, the mortgagor was dead and had no legal personal representative. There was therefore no person to whom notice could have been given, and it may be that the sale was thus irregular. But the question cannot arise in the present suit. The rights of the mortgagor other than those which he has by special agreement, are purely equitable and are not cognizable in a Court of Law. If, therefore, the interests of the mortgagor have been prejudiced, he must seek for redress in another manner.

I may mention that it does not appear to me from the evidence that the representatives of the mortgagor have been prejudiced. There is no reason to believe that the property was not sold to the best advantage, and in point of fact there is still a considerable balance due to the defendant. Under any circumstances, therefore, according to authority of *Brierley v. Kendall*,

HACKETT, J. and *Johnson v. Stear*, the plaintiff, even if he were entitled to judgment in his favour, could only claim nominal damages.

MAXWELL I think, therefore, that law agrees here with equity in giving judgment for the defendant.

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SHELLUMBRUM CHETTY v. PHILLIP JONES.

PENANG.

The assignment by a public officer in the service of the Government of the Colony, of his stipend to another, to secure repayment of a loan, is contrary to public policy and illegal.

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This was an action to recover \$380, due on an agreement. The declaration averred that "the defendant on the 28th day of April, 1867, and then still being the Assistant Colonial Treasurer at Penang, and as such his duty was and still is to pay monthly and every month to all officers of the Colony such proportion of their respective salaries as should then be respectively due to each of them; and that one James Bridger Dill Rodyk was and still is the Deputy-Sheriff of Penang, and as such was and still is entitled to receive from the defendant every month the sum of \$113.63 or thereabouts; the defendant, on the day and year aforesaid, in consideration that the plaintiff would then lend to the said James Bridger Dill Rodyk the sum of \$3,500, which the said James Bridger Dill Rodyk then by a deed bearing that date covenanted to repay in monthly instalments of \$50 each, besides \$45 *per mensem* for interest thereon, he the defendant promised and agreed with the plaintiff, that he the defendant would, with the permission and concurrence of the said James Bridger Dill Rodyk retain \$95 out of the salary of the said James Bridger Dill Rodyk every month and would pay over the same to the plaintiff in satisfaction of such the instalment due for such month. And the plaintiff averred, that to better enable him to perform his agreement, the said James Bridger Dill Rodyk on the 30th September, 1867, gave to the defendant, a written power of Attorney authorizing the defendant to make such monthly payments from the salary of the said James Bridger Dill Rodyk to the plaintiff, and the defendant thereupon did pay the plaintiff five of the monthly instalments as agreed, and that all conditions were fulfilled and all times elapsed and all things done necessary to entitle the plaintiff to claim from the defendant payment of four more of the said instalments, but the defendant had not paid the same."

The defendant demurred to this declaration and stated the matter intended to be argued was, that the assignment by a public officer of his stipend to another man, is contrary to the policy of the law and illegal.

The plaintiff joined in demurrer.

D. Logan [*Solicitor-General*] for demurrer submitted the declaration was bad on the ground that an assignment of an officer's salary was contrary to public policy, and cited *Banvick v. Reid* 1 H. Black, 627; *M. Killubdass v. Vans Kennedy*, Perry's Oriental Cases, p. 167; *Flarty v. Adlum*, 3 T. R. 681; *Wells v. Foster*, 8 M.

& W. 149; *Dent v. Dent*, 1 L. R. Pro. & Div. 366; *Arbuthnot v. Norton*, 10 Jur. O. S., p. 145; *Knight v. Bulkley*, 4 Jur. N. S. 527, S. C. 5. Jur. N. S. 817.

R. C. Woods, junr., in support of the declaration contended that the principle laid down by these cases did not apply to a ministerial officer in this Colony, such as the Deputy-Sheriff was.

Hackett, J.—said that he could not see the difference attempted to be drawn between this case, and those cited on behalf of the defendant, that he was of opinion that the declaration was bad for the reason assigned, and the demurrer must be allowed.

Demurrer allowed.

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BRUM CHETTY
"JONES.

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The powers of Commissioners of the Court of Requests are strictly limited by section 20 of Act XXIX. of 1866; and as regards contempts, they possess no further powers of dealing therewith, than those expressly given by that section. (C)

The Commissioners have no power to deal with a contempt out of Court.

A single Commissioner has no power to fine for contempt, and none to imprison for non-payment of the fine.

Query. Is the Court of Requests a Court of Record? [a]

In England, the Judge of an inferior Court, is liable to an action, if he acts beyond his jurisdiction, and then knew, or had the means of knowing the defect; and this although he acted *bonâ fide*. In this Colony, however, since the Act XVIII. of 1850, he is not so liable, if he, at the time, in good faith believed himself to have jurisdiction, but in all such cases, he must have acted really and *bonâ fide* in his judicial capacity, and not merely colourably so.

Query. Does Act XVIII. of 1850 apply to cases where the excess of jurisdiction is due to the Judges misconception of the law, or only to ignorance of facts affecting his jurisdiction?

The Act, however, can only afford protection where the Judge acts in good faith: but "good faith" must be founded on reasonable grounds [b], or otherwise the Judge's immunity from legal liability for acts done out of his jurisdiction, would be in direct proportion to his ignorance and thoughtlessness.

Query. Is a Judge of an inferior Court liable, if he act within his jurisdiction, but does so maliciously and without any reasonable or probable cause?

Semble. The test in such a case, probably is, whether he acted really or only colourably judicially.

The plaintiff, a Solicitor, served the defendant, a Commissioner of the Court of Requests, at his private residence, with an ordinary notice of appeal on behalf of a suitor in the Court of Requests, and also served a similar notice on the clerk of the Court. A day or two after, the plaintiff received a letter from the clerk, written by instructions of the defendant, requesting the plaintiff kindly to call at his [defendant's] office, as he [defendant] wished to speak to him. The plaintiff accordingly went to the defendant's office, but found him out. In passing the Court, he saw the defendant on the Bench trying a case; he sent in his card, whereupon the defendant beckoned him into Court. The plaintiff walked up to the Bench, and stood between it and the table of the clerk, and the business before the Court was suspended for the time. The defendant then had some conversation with the plaintiff, during which the defendant informed the plaintiff that the notice was a very improper one, and was very improperly served, and after further conversation on the subject, [which the defendant considered to be carried on in a disrespectful and contemptuous manner on the part of the plaintiff,] the plaintiff informed the defendant that he came to see him simply as a private individual in consequence of his request, and not in his judicial capacity, and was not a party in any proceeding before his Court, and wishing him "good morning," was about walking away, when the defendant called him to stop; the plaintiff con-

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[a] See Maxwell [W. E.] on the Court of Requests, p. 7.

[b] As to law now, see Sections 52 and 77 of the Penal Code [Ord. I. of 1871.]

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tinued walking, and the defendant thereupon called out, "You are fined \$25 for "contempt of Court," to which the plaintiff replied, "I wish you may get it," and walked out. The following day, the defendant issued his warrant for the apprehension of the plaintiff if he omitted to pay the fine, the plaintiff still refusing to pay the fine, he was lodged in prison for some days under the warrant, whereupon he brought an action against defendant for false imprisonment, to which the defendant replied he did the act in his judicial capacity.

Query. Whether under the circumstances, the defendant could be considered as really acting judicially or only colourably so?

Held, however, whether the defendant acted judicially or not, as a single Commissioner of the Court of Requests, he had no power to fine or imprison for contempt: that having acted beyond his jurisdiction, without any reasonable grounds for believing he had jurisdiction, he was liable in damages to the plaintiff for the false imprisonment.

Action to recover \$2,500 for assault and false imprisonment. Pleas, not guilty by Statute; secondly: a special plea, that at the time of the committing of the alleged grievances, the defendant was a Judge or Commissioner of the Court of Requests, and acted under the power conferred on him by Act XXIX. of 1866, sec. 20. Issue thereon.

The plaintiff was a Solicitor of this Court, and had been practising as such for about seven years before this action: he was also a Solicitor of the Supreme Court of Scotland. In June, 1867, during the course of his professional employment, an application was made by one Hassan Hussein Beebee, [the wife of a peon named Dawdsah,] who had been committed to gaol upon a warrant from the Court below, for new trial. The plaintiff herein was engaged as her legal adviser, and gave notice to the Commissioner of the Court of Requests [the defendant] that his decision would be appealed against on the following grounds, first, for refusal to hear the defendant or her witnesses; and, secondly, because the defendant was at the commencement of the action against her, and at the date of the judgment, the lawful wife of the plaintiff [Dawdsah]. Notice was also given that a writ of *Habeas Corpus* would be moved for, to release her from H. M.'s gaol, where she had been committed under a warrant signed by the defendant. A copy of each of these notices was served upon defendant, and a similar one, upon the clerk of the Court of Requests, Mr. W. Norris. An application was made to the clerk for a copy of the proceedings, to which no reply was given. On the 15th June, a note was addressed by the clerk to the plaintiff, which ran as follows:

"DEAR SIR,—Captain Ord desires me to request you will kindly call at "his office at 11 a. m., on Monday next, as he wishes to speak to you.

"Yours truly,

"W. NORRIS."

Believing that it was on some private business that defendant required the plaintiff, the latter went on the Monday following at 11 a. m., as desired. Not finding defendant in his room, the plaintiff went round to the Court, and on passing by one of the doors, he observed a gentleman sitting on the bench whom he presumed was the defendant. Plaintiff then sent up his card by a peon, and defendant beckoned to him to come up as far as the bench, in rear of the clerk's table, which he accordingly did.

The proceedings of the Court were then temporarily stayed, whilst some private conversation was being held between the two parties. The defendant interrogated the plaintiff as to the fact of the latter having sent him the notice, and said it was a most improper one and most improperly served at his dwelling house. The plaintiff then replied, that he knew his own business best, and therefore did not want defendant to give him any instructions in the matter. The defendant then said, "I treat your notice with contempt, sir," at the same time throwing down the notice on the table, to which the plaintiff replied: "If that is all that you have to say to me, you might have saved yourself the trouble of sending for me, and me the trouble of coming to you." Defendant replied that he had a great deal more to say to the plaintiff, but the latter said he did not wish to hear any more in this strain, and walked away. On reaching the door, defendant called out in a loud tone of voice, "you are fined \$25 for contempt of Court," to which plaintiff replied, "I wish you may get it." The plaintiff previous to this, had informed defendant that he was not before the Court, nor was he addressing him in his *judicial capacity*, but merely as Captain Ord. The following day, the bailiff of the Court of Requests went to plaintiff's office in Collyer Quay, and threatened to take him off to gaol unless the money was forthwith paid. Plaintiff, considering that the fine was illegal, refused to pay it, and was therefore taken to gaol. An application was made to this Court, on an affidavit sworn to by defendant in gaol, before one of the Commissioners appointed to take affidavits, on the 21st June, 1867, for a writ of *Habeas Corpus*. Whilst the application was being made to the then Acting Colonial Secretary, who was also at that time one of the Judges of this Court, His Excellency the Governor having considered the matter, a note was accordingly sent by the Colonial Secretary, Colonel Macpherson, to the Gaoler, ordering him to release the plaintiff. That not being considered a sufficient authority by plaintiff, he preferred remaining in gaol until he was released by a *pro formá* order from the Court directed to the Sheriff. H. E. the Governor then thought proper to remit the fine inflicted upon the plaintiff, and the Colonial Secretary wrote a letter to the Sheriff stating that the fine had been remitted. The writ of *Habeas Corpus* was applied for, but was refused as the Sheriff said he had no such person as plaintiff in his custody. No application was made by the plaintiff to His Excellency the Governor to remit the fine, and the plaintiff disclaimed having committed any contempt of Court. The plaintiff was afterwards released, and this action was commenced a month thereafter; and after the lapse of more than a year, came on for hearing before the Court.

R. C. Woods, senr., [Atchison with him] for plaintiff, referred to *Baker v. Rye*, 2 L. J. Exch. 169; *Beaurain v. Scott*, 3 Campbell, 388; *Mosely on Inferior Courts*, p. 359; 3 Cro. 689; *Levy v. Moyland*, 19. L. J. C. P. 308, s. c. 10 C. B. 189; *Houlden v. Smith*, 14 Q. B. 841; *Pollard v. Smale*, 2 L. R. P. C. 106; *Cann v. Clipperton*, 10 A. & E. 582; *Rex v. Faulkener*, 2 Mon. & Ayr. 311; *Max. on Mag.* 19 & 12, Co: 96 b. He submitted that under

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sec. 20 of Act XXIX. of 1866, a Commissioner of the Court of Requests could not, on his own responsibility, fine an offender for contempt of Court; he could only order the person, who commits such contempt, into custody, to be detained until the rising of the Court, when the Commissioners, not a single Commissioner, should deal with the offender by inflicting upon him a fine, and in default of payment thereof, commit him to prison for any time not exceeding seven days. He therefore contended that defendant had greatly overstepped the mark in acting in the manner he had done. The defence that what had been done was done by the defendant in good faith, believing that he *had* jurisdiction, could not be sustained, as a man might be foolish enough to commit the grossest absurdities by believing himself justified in what he does.

T. Braddell [*Attorney-General*], for the defendant, contended that the defendant was acting in his magisterial capacity when he imposed the fine of \$25 upon the plaintiff, and that even if he was acting beyond his jurisdiction, he had done so in good faith, and was protected by Act XVIII. of 1850, that "Commissioners," in sec. 20 of Act XXIX. of 1866, must be read as in the singular, according to the Interpretation Ordinance XIV. of 1867, sec. 21, cl. 20.

Cur. Adv. Vult.

November 2. *Maxwell*, C. J. In this case, the first count of the petition is in trespass for the false imprisonment of the plaintiff. The second count is also for the false imprisonment, alleging it to have been done maliciously, illegally, and without reasonable or probable cause. The defendant pleaded not guilty by Statute, referring to the 42 Geo. III. c. 85, Act XVIII. of 1850, and Act XXIX. of 1866; and a second plea alleging that the matters and things complained of were done by the defendant in his judicial capacity as a Commissioner of the Court of Requests, under powers vested in him by the Act XXIX. of 1866. The plaintiff took issue on both pleas, and replied further, that there was no such Court, that the defendant was not a Judge or Commissioner, and that he was not acting in a judicial capacity at the time when the matters and things were done.

The circumstances of the case are these:—The plaintiff is a legal practitioner of this Court, and the defendant was, from April to December, 1867, a Commissioner of the Court for the recovery of small debts, or Court of Requests of Singapore. That Court was created by the Governor and Council of these Settlements in 1828, under authority vested in them by the Charter of Justice. The proclamation which constituted it says, that it is to consist of Commissioners, [without stating what number,] and it appoints three gentlemen to be the first Commissioners. The jurisdiction was limited to cases where the cause of action did not exceed thirty-two dollars; and among the powers given to the Commissioners was one which, to prevent insult and abuse in the Court, authorized them or any of them, to issue a warrant under their or either of their hands, to apprehend and bring before them on the next Court day, any person who affronted, insulted, or abused any

of them, or their clerk, in the execution of their respective offices, or interrupted or disturbed the proceedings of the Court, and on the offence being proved, the Court was empowered to fine the offender as much as 20 dollars and if he did not pay, to commit him to jail for as much as a month. The jurisdiction of this Court was extended by Act XXIX. of 1866, to cases where the cause of action did not exceed 50 dollars; and the 20th section provides that if any person shall wilfully insult any Commissioner or officer during his sitting or attendance in Court, or shall wilfully interrupt the proceedings, or otherwise misbehave in the Court, the bailiff or officer of the Court may, by order of a Commissioner, take him into custody, and detain him until the rising of the Court; and the Commissioners are then empowered, if they think fit, by warrant under their hands and the seal of the Court, to commit him for any term not exceeding seven days, or to impose on him a fine not exceeding 25 dollars, and, in default of payment, to commit him for the same period, unless it be sooner paid.

At the time of the occurrence which is the subject of this suit, there were four Commissioners of the Court of Requests.

It is unnecessary to consider whether that Court is a Court of Record; for I am of opinion that whether it is or is not, its powers and the powers of its Judges are limited by the enactment just cited; and that, as regards contempts, it and they possess no further or other powers of dealing with them than those expressly given therein.

This, then, being the position of the parties, it appears that the plaintiff, as the attorney of a woman named Hassan Hussein Beebee, and by her instructions, sent a notice to the defendant, and to the clerk of the Court, stating that his client intended to appeal to this Court against a judgment pronounced by the defendant against her. The plaintiff shortly afterwards applied to the clerk of the Court for a copy of the proceedings; he did not get them, but, on the 15th, he received a note from the clerk in these words: "Captain Ord desires me to request you will kindly call at his office at 11 a. m., on Monday next, as he wishes to speak to you." Mr. Davidson, the plaintiff, called accordingly on Monday, the 17th, about the hour indicated; and not finding the defendant in his office, he went into the Court, where the defendant was sitting on the bench, engaged in trying a cause. The plaintiff sent his card to the defendant, who, on receiving it, beckoned to the plaintiff to come to him. The plaintiff went to the place below the Commissioner's desk, close to where the clerk of the Court sits, and a conversation ensued, which, according to Mr. Davidson, was as follows:—

"The defendant said, Did you send me this notice? holding at the time a paper. I answered, Yes. He spoke roughly and sharply. He said, Read it, holding it out to me. I declined, I said, I know the contents very well. He said, It is a very improper notice. I said, I beg your pardon, Captain Ord. He said, You have also served a notice on my clerk. I replied, Yes. He then said, This notice has been very improperly worded, and very improperly served. I said, I have been too

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"long in the profession to take a lesson from you, in writing
"or serving a notice. He said, Is it proper to serve a notice
"on a Magistrate at his dwelling house? I said, It is
"sufficient that I know the notice has reached you; but I know
"nothing of you in your Magisterial capacity, I was asked to
"come to speak to you as Captain Ord. He said something
"about the dignity of the bench on which he sat; but I did not
"catch his words exactly. I said, I came to speak to you as an
"individual; I am not in the Court of Requests, and, when I am
"wanted there, proper steps can be taken to bring me. He then
"took up my notice, and in an excited tone, said, I treat your
"notice with contempt, Sir, with contempt! and he threw it
"down. I laughed, and said, If that is all that you had to tell
"me, you might have saved yourself the trouble of sending for
"me, and me the trouble of coming here; good morning. He
"said, I have a great deal more to say to you, Sir. I said, I
"don't choose to hear anything more in this strain, I wish you
"good morning. I turned round and was walking away when he
"said; stop, Sir. I continued to walk on. Then I heard him
"say; You are fined 25 dollars for contempt of Court. I said, I
"wish you may get it; and I continued walking. I did not speak
"in an excited or insulting manner. I spoke quietly; the last
"two or three sentences louder. He did not say of what my con-
"tempt consisted. The plaintiff then left the Court."

The defendant's version is as follows:—

"I shewed him the notice, saying I had received it from him,
"and, as I considered, in an improper manner. His answer was,
"I have been too long at the work not to know how to serve a
"notice. He said this in a jeering and insulting tone, laughing
"at the same time. All this was spoken in a low tone on both
"sides. I said, Mr. Davidson, your manner is most contempt-
"uous. He answered, If that is all you have to say, I'll leave.
"I said, I have something more to say; I object to your sending
"notices to my clerk. He said, If that is all you have to say, I
"had better leave. I again said his manner was contemptuous.
"He turned round to leave. I said, Stop, if you please. He
"moved on, and as he got to the door, and in his hearing, I said,
"You are fined 25 dollars, for contempt of Court. I never said,
"I treat your notice with contempt, nor did I throw it down or
"any other paper." With the exception of the defendant's denial
that he threw down the notice, or used the words imputed to him
as accompanying the alleged act, and his assertion that he told the
plaintiff that his tone was contemptuous, there is no material
variance between his and the plaintiff's accounts of what passed.

The conviction or adjudication was by the defendant, as a
Commissioner of the Court; and on the afternoon of the 18th,
the day after the occurrence, the bailiff of the Court received a
warrant under the seal of the Court and signed by the defendant,
requiring him to arrest the plaintiff, and to deliver him to the
keeper of the jail, to be there confined for seven days, unless he
sooner paid the fine of twenty-five dollars. On the morning of the
19th, Wednesday, the bailiff proceeded to Mr. Davidson's office,

and on the refusal of the latter to pay the fine, took him to jail, where he was confined till the following Saturday, on which day he left, in consequence of the remission of the fine by the Governor.

The action was begun after a month's notice, on the 30th of July, 1867, but was not tried until the present sittings.

There being no dispute as to the fact that the plaintiff was imprisoned by the defendant, the question is whether that imprisonment gave the plaintiff a cause of action against him. The defence was, in substance, that the act complained of was a judicial act, that it was done by the defendant within his jurisdiction, or if not within it, that it was done in the *bonâ fide* belief that it was within it; and that, consequently, the defendant is not liable to this action.

The general principles of law, on the subject of the liability of the judges and judicial officers, I conceive to be these:—no action lies against a judge of the superior Courts for any judicial act; and no action lies against a judge of an inferior Court, for any judicial act done within his jurisdiction, at all events when not done maliciously and without reasonable or probable cause. Nor is he liable for doing an act out of his jurisdiction, if the defect was owing to a fact which he did not know, and had not any means of knowing, of which he ought to have availed himself. But if he does an act out of his jurisdiction, knowing or having means of knowing the defect, he is, in England, liable to be sued for it, though it was done *bonâ fide*. In this country, since the passing of the Indian Act XVIII. of 1850, he is not liable for any judicial act done out of the limits of his jurisdiction, if he, at the time, in good faith believed himself to have jurisdiction to do it. In all cases, however, where protection is given to a judge, he must have acted really and *bonâ fide* in his judicial capacity. Whether he is liable for judicial acts done within his jurisdiction, maliciously and without reasonable or probable cause, may perhaps be open to question. The affirmation seems to have been assumed in *Ackerley v. Parkinson*, 3 M. & S. 425; *Linford v. Fitzroy*, 13 Q. B. 240; and *Kirby v. Simpson*, 10 Exch. 351; while the negative was broadly asserted in the recent case of *Scott v. Stansfield*, L. R. 3 Exch. 220. Perhaps the liability would be found to depend on whether the act was really or only colourably judicial. Thus, a judge of an inferior Court would not be liable to an action for words spoken by him maliciously and without reasonable or probable cause, in the course of the trial of a cause within his jurisdiction, *Scott v. Stansfield*, L. R. 3 Exch. 220; but he might be liable, if, not acting really as a judge, but merely under colour and in sheer abuse of his office, he were to do an act within the jurisdiction of his office, such as convicting of an offence for which he had power to convict, but convicting without any evidence, or without information, maliciously and without reasonable or probable cause; see the remarks of Chief Baron Pollock in *Gelen v. Hall*, 2 H. & N. 393, and *Kirby v. Simpson*, 10 Exch. 358, *Windham v. Clere*, Cro. Eliz. 13, *Morgan v. Hughes*, 2 T. R. 225. It is a point, however, on which it is unnecessary for me to express any opinion in this case.

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The first question that occurs in considering the facts of this case, is whether the act complained of was really or only colourably a judicial act. It is to be observed that the plaintiff was not before the defendant in any judicial matter. A note requesting him "kindly to call" on the defendant at his office or private room, as the latter desired to speak to him, cannot be construed into any thing more than a request for a private interview. The invitation to the plaintiff, upon receiving his card, to come up to the desk, instead of taking his place at the bar, as well as the tone of voice in which both spoke, are further proof that the interview was, to all intents and purposes, private. The object which the defendant says he had in sending for the plaintiff, viz. to "remonstrate" with him, leads to the same conclusion; and if the notice was thrown down with the expression alleged by Mr. Davidson to have accompanied that act, it would be but additional evidence that the defendant was acting in his private and not his judicial capacity. Besides, the subject of the interview could not have been legally a matter of judicial enquiry; for, if the contents or the service of the notice were objectionable, it would have been in the nature of a contempt out of Court, but the Commissioner had no jurisdiction to deal with such a contempt. The question then arises whether, when matters had arrived at a stage where the plaintiff said or did something which defendant considered disrespectful, whether it was the language or the tone of the plaintiff, or his refusal to continue a conversation which had become angry, or his refusal to obey the defendant's order to remain in Court, when he was leaving it, does not appear, the defendant could really and *boná fide* assume the judicial character, and deal with the plaintiff for disrespect to him in that character. The only ground on which such a proposition could be maintained is, that the place where the conversation took place was the room in which the causes of the Court of Requests are heard, and that the officers and suitors were present. It would have to be observed, however, on the other side, that the sitting was suspended by the judge for the transaction of a private matter with the plaintiff; so that, as regarded the plaintiff and the defendant, so long at least as the letter did not depart from the subject of the conversation, it might be said that the Court was not sitting. I abstain, however, from pronouncing an opinion on the question, because, assuming that the act complained of was not colourably judicial only, I think it clear that it was not an act within the defendant's jurisdiction. He had no power, alone, to adjudicate on contempts at all. His power was limited to ordering an offender into custody until the rising of the Court; and this, plainly, for the purpose of securing his attendance before the tribunal which was entrusted with the power of dealing with the contempt. And it is observable that it is not to "the Court" that power is committed, for that would have probably been but a different way of speaking of the Commissioner who had been insulted; it is the general body of Commissioners who are to deal with the matter; the fine imposed by them is leviable in a different manner from fines imposed by "the Court" [sec. 14]; and the warrant of com-

mitment is to be signed by the Commissioners, as well as to be under the seal of the Court. In short, the object of the legislature appears plainly to have been, not to leave it to the offended Commissioner, or to "the Court," to punish for a contempt, but to delegate that power to the Commissioners generally, whose duty would be to enter upon the inquiry judicially, hearing what the offender had to say in his defence; and a further object was, to avoid an immediate adjudication, even if all the Commissioners were present at the time of the offence, in order to afford time for reflection. In all these respects, it is clear that the defendant's act was in no way conformable to the law; he had no power to fine for contempt, and none to imprison for non-payment of the fine. With respect to the argument, that the words "the Commissioners" in the 20th section, should be read in the singular, because by an Act passed by the Legislative Council of this Colony last year, it is enacted that the singular shall include the plural, and the plural the singular, unless the contrary is expressly provided, or unless there be something in the context repugnant to such construction, it is enough to say that such a construction would defeat the plain meaning and object of the legislature. And with respect to the further argument, that inasmuch as the defendant had power to detain for a contempt until the rising of the Court, he had jurisdiction over the subject matter, and having also jurisdiction over the place and the person, he was not liable to be sued for his act; the answer is, that those circumstances did not bring the case within his jurisdiction, when his act was one which it was not competent for him under any circumstances to do. The power of detention till adjudication is not a power to adjudicate, and an adjudication by the defendant was not merely an irregularity or proceeding *inverso ordine*, but an act beyond his jurisdiction; just as a commitment by a justice of the peace for an indefinite time, for default of sureties to keep the peace, is an act out of the justice's jurisdiction, and for which he is liable to an action, although he has power over the place, person, and subject matter, and also has authority to commit, though for a limited and definite time only; *Trickett v. Gratrex*, 8 Q. B. 1020. In this respect the case differs altogether from *Kemp v. Nevile*, 10 C. B. N. S. 523, where the defendant had power to do the judicial act complained of, however irregularly the power may have been exercised.

The only remaining question then as regards the defendant's liability is, whether he is protected by Act XVIII. of 1850; that is, whether, having done an act out of the limits of his jurisdiction, he "at the time, in good faith believed himself to have jurisdiction to do or order the act complained of." Assuming that the Act of 1850 applies to cases where the excess of jurisdiction has been owing to the judge's misconception of the law or of his powers, and not only to ignorance of facts affecting his jurisdiction, I think that the question must be answered in the negative. Even if I were better satisfied than I am, of the judicial nature of the act, and of the animus and temper of it, I should still have to observe, that, "good faith" must be founded on reasonable grounds, *Kine v. Evershed*, 10 Q. B. 143, otherwise this

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absurd consequence would follow, that the extent of a judge's immunity from legal liability, for acts out of his jurisdiction, would be in direct proportion to his ignorance and thoughtlessness; which would undoubtedly lead to the "will work" spoken of by Mr. Justice Williams in *Cann v. Clipperton*, 10 A. & E. 589. Here, I am constrained to say that I fail to see in this case that element which is necessary to entitle the defendant to the protection of the Act of 1850. [a]

It remains to determine the amount of damages. Mr. Woods, on behalf of the plaintiff, claimed that they should be exemplary; and, in general, I am disposed to visit with some severity everything that savours of an abuse of power by any public officer. But, in this case, I do not think that I ought to give heavy damages, and for this reason;—The action was begun as long ago as July, 1867, and has therefore been pending over the defendant for fifteen months. I asked the plaintiff the reason of the delay, and he said that he acted under the advice of his counsel. Now, I think it was very hard on the defendant to keep him thus for such a length of time with a law suit hanging over his head, and under the continued threat, as it were, of a trial. It is true, he might, after a time, have applied for judgment as in case of a non-suit, but though he had this remedy, the long pendency of the action was nevertheless calculated to be a serious annoyance to him; and this, I think, I ought not to lose sight of for the present purpose. But further, when the plaintiff claims damages for the insult which he has received, it is not unreasonable to measure, to some extent at least, the moral injury which he has sustained, by the degree of alacrity which he shews to obtain redress; and this also, would I think, incline a jury, and should also lead me, who have here to fulfil the functions of a jury, to moderation in estimating the damages. At the same time, it is necessary in cases of this kind, that the damages should be substantial enough to indicate, that any wrongful exercise of power on the part of persons in authority, especially when affecting the liberty of the subject, is not viewed lightly by English law. Taking all the circumstances into consideration, there will be judgment for the plaintiff for One Hundred Dollars.

MAHOMED GHOUSE v. RABIA. [b]

SINGAPORE. Since the Limitation Act [XIV. of 1859] became Law in this Colony, part payment of principal or interest has ceased to revive a debt, if it be otherwise statute barred.

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A statement of accounts between the parties, in which items appear on both sides, and a balance is struck which is verbally acknowledged to be correct, does not revive the debt.

The English Law on that subject is now quite inapplicable to this Colony.

Action for money lent. Plea that the cause of action did not arise within three years before suit. The plaintiff and defendant

[a] See *Taraknath Mookhopadhyay v. The Collector of Hooghly & ors.* 4, Bengal L. R. Civ. 37.

[b] See, further, *Neoh Chin Tek & ors v. Tan Deow*, decided by Phillipo J., December 1876, *infra*.

had within three years before suit, gone into accounts, in which items appeared on both sides, and a balance was struck in favor of the plaintiff. The defendant acknowledged this account and balance to be correct, but saving the accounts and balance so struck, [which were not signed by the defendant,] there was no acknowledgment in writing.

A. Baumgarten, for plaintiff.

Defendant in person.

Maxwell, C. J.—In this case the defendant has pleaded to an action for money lent, that the cause of action did not arise within three years, the period within which suits for debts must be brought, since the Act XIV. of 1859 came into operation. To avoid the operation of the Act, the plaintiff proved that he and the defendant had in December, 1865, gone through their accounts, which had items on both sides, and struck a balance, which the defendant had admitted to be correct; and Mr. Alexander Baumgarten contended, on the authority of *Ashby v. James*, 11 M. & W. 542, that going through an account with items on both sides, and striking a balance, convert the set off into payments, and that, thus by part payment at that date, the case was taken out of the Act. But the question remained whether part payment has any such effect under the Indian Act. The point has been decided in the negative by the High Court of Madras, as I find from Mr. Thomson's *Treaties on the Act*, p. 246, *et seq.*: and I might therefore confine myself to following that authority. But it will perhaps be more satisfactory to the parties if I state shortly the grounds in which this conclusion rests. The English Act of James I. requires that all actions of trespass, detinue, trover, assumpsit and debt shall be brought within six years *from the cause of action*. It was early established that when the cause of action is a debt, an acknowledgment of it made to the creditor implied a promise to pay, unless it was accompanied by language expressive of a different intention; and the debt might be recovered within six years from that promise, for in such a case it was the new promise and not the old debt that was the cause of action. But an acknowledgment may be made not only by word but by part payment, which is an acknowledgment by deed; and a fresh promise to pay is as obviously inferred from that Act as from an oral acknowledgment. Then came Lord Tenterden's Act [9 Geo. IV., c. 14] [a] providing that no acknowledgment by words should be operative unless it was reduced into writing signed by the party chargeable by it, without prejudice, however, to a revival of the debt by part payment. Thus, in England at the present time, a simple contract debt may be taken out of the statute either by a written acknowledgment signed by the debtor [or his agent, 19 & 20 Vict., c. 9] or by part payment. But the Indian Act is different from the English Law. It provides, as regards action for money lent, that the suit must be brought within three years from the time *when the money became due*, unless [sec. 4] the debtor has admitted it by an acknowledgment in writing signed by him, in which case the Act runs from

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[a] Extended to this Colony by Act XIV. of 1849, impliedly repealed as regards this question by Act XIV. of 1859.

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the date of the acknowledgment. This is equivalent to a declaration that any other kind of acknowledgment is unavailing to avoid the operation of the Act; and, consequently, the acknowledgment made by part payment is unavailing for that purpose.

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January 19.

A direction by a testator, that the rents and profits of his land should be expended on certain ceremonies called "Sin Chew," is void as being in perpetuity, and not a charity.

The Statutes 1 Ed. VI., c. 14; 23 Hen. VIII., c. 10, and 9 Geo. II., c. 36, held not to be law in the Straits Settlements. [a]

This was a suit by certain next of kin for the administration of the testator's estate and for a declaration that certain bequests were void, and the property comprised therein was distributable amongst the next of kin.

Atchison, [A. M. Aitken with him,] for plaintiff.

B. C. Woods, senr., for defendant.

Cur. Adv. Vult.

On this day judgment was delivered by
Maxwell, C. J.—In this case the testator, Choa Chong Long, a person born and domiciled in Singapore, but of Chinese descent, by his Will, in the English language, after bequeathing legacies of 500 dollars apiece to each of his two sons and four daughters, and making provision for another son, and after reciting that he was erecting a building for charitable purposes, and for the performance of religious ceremonies, according to the custom of his ancestors, called *Sin-Chew*, to perpetuate the memories of his departed wives, as also of himself, after his decease, devised certain houses and land in Singapore and Malacca, and also his residuary estate, to trustees, upon trust, to apply the rents and profits, after providing for repairs and insurance, "in the performance of such *Sin-Chew* or Charity, in and to the names of myself and my said wives hereinbefore named and mentioned, to be performed four times in each and every year at the least, and as much oftener as the funds applicable thereto will admit." The Will contains also a direction to the trustees to see that the "Charity" is faithfully carried into effect according to the mode practised in cases of Charities in the Indian Presidency towns; it requires that the lands devised shall be held and continued in the testator's own name for ever, according to the term of the original grants; and it declares that the testator's wish is to preserve the funds so intended to be applied to such religious and charitable purposes as aforesaid, from being embezzled or made away or interfered with by his sons, daughters or relations, or otherwise diverted from the purposes contemplated, not doubting that the East India Company and those in authority under them, would by due enforcement of its provisions, encourage wealthy, industrious and honest Chinese

[a] By this decision, the judgment delivered by McCausland, R. in *the Goods of Choa Chong Long, deceased*, in 1857 [not reported], was practically overruled. The present decision was approved of in *Ong Cheng Neo v. Yeap Cheah Neo*, 6 L. R. P. C. 381. [24th July, 1872. *infra*.]

and other settlers in the Company's territories, to follow his example and thereby ultimately advance the wealth, prosperity, and permanency of its possessions in these parts.

The testator died about thirty years ago, leaving the two sons and four daughters, to whom he had given the pecuniary legacies mentioned, and who, or whose representatives, are the plaintiffs in this suit, and leaving the other son already referred to, whom he describes as an object of his especial affection, but who is said by the plaintiffs to be illegitimate. The personal representative of this son is a defendant in this suit, but is out of the jurisdiction, and has not appeared or pleaded. The other defendant is the representative of the testator.

After the death of the testator, several applications were made to this Court, on its Equity and Ecclesiastical sides, by some of the plaintiffs or next of kin under whom some of them claim, the general result of which seems to be that a receiver was appointed, that it was ordered that the sum of \$280 a year should be set apart out of the rents, for the performance of the ceremony mentioned, and that the residue of the rents and profits should be paid into the treasury to the credit of the *Sin-Chew* fund. The fund thus accumulated amounts now to upwards of \$33,500. These various proceedings were set up by the answer as a bar to this suit, but I held at the hearing that they had not that operation, whether regard were had to their *ex-parte* character, or to the side of the Court in which some of them had been taken. It is therefore incumbent on me to determine the question raised by the suit. The petition prays that it may be declared that the devise for the *Sin-Chew* is void, and that the testator died intestate as to the property devised for that purpose, and consequently that it goes to the next of kin.

Several Chinese, men of learning, have been examined for the purpose of ascertaining what are the nature and object of this devise, and the substance of their evidence is as follows: The word *Sin-Chew* is composed of *Sin*, which means spirit, soul or ghost; and *Chew*, which means ruler; and the composite word means the spirit ruler or spiritual head of the house. When a man dies, his name, with the dates of his birth and death, is engraved on a tablet; this is enclosed in an outer casing, on which a new name, which is now for the first time given to him, and the names of his children, are engraved. This tablet is kept either in the house of the worshipper, or in that which has been set apart for the *Sin-Chew*. It is sacred, and can be touched only by the male descendants or nearest male relatives of the deceased, who alone may look upon the name on the enclosed tablet. It is the representation of the deceased. At certain periods, *viz.*, on the anniversary of his death, and once in each of the four seasons, his son or sons, or if he has none, his nearest male relative, but never his daughters or other females, go to the place where the tablet is, and lay on a table in front of it a quantity of food, such as pigs, goats, ducks, fowl, fish, sweetmeats, fruit, tea and arrac'. They light joss-sticks, fire crackers, burn small squares of thin brown paper in the centre of each of which is about a square

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inch of gold or silver tinsel, they bow their hands three times, kneel, touch the ground with their foreheads, and call on the *Sin-Chew* by his new name to appear and partake of the food provided for him. The food remains on the table for one or two or even three hours, during which time the spirit feeds on its ethereal savour; and to ascertain whether it is satiated or satisfied, two *pitis* [Chinese coins] or two pieces of bamboo are thrown on the table or on the ground in front of it, and if they both turn up with the same face, the offering is considered insufficient, and more food is laid on the table. After the lapse of a sufficient time to allow the spirit to partake of it, the same test is again resorted to, and so, until the coins or bamboos, by turning up different faces, shew that the spirit has had enough. The food is then removed, and eaten or otherwise disposed of by the relatives, but there is no distribution of it in charity or among the poor. Indeed the Chinese have a repugnance to food which has been offered in this way, except when they are members of the family. The papers which are burnt supply the spirit with money and clothing, the gold and silver tinsel turning into precious metal. No prayers are offered to the spirit; the person who makes the offering of food asks for nothing whatever. The primary object of the ceremony is to show respect and reverence to the deceased, to preserve his memory in this world, and to supply his wants in the other. Its performance is agreeable to God, the supreme all-seeing, all-knowing, and invisible being, who assists and prospers those who are regular in this duty; and its neglect entails disgrace on him whose duty it is to perform it, and poverty and starvation on the neglected spirit, which then leaves its abode [either the grave or the house where the tablet rests] and wanders about, an out-cast, begging of the more fortunate spirits, and haunting and tormenting his negligent descendant, and mankind generally. To avert the latter evil, the wealthier Chinese make, in the seventh month, every year, a general public offering, or sacrifice, called *Kee-too* or *Poh-toh* for the benefit of all poor spirits.

The question is whether this devise or bequest is valid.

No difficulty arises in respect of the 9 Geo. II., c. 36, commonly called the Mortmain Act; for that Act is not law here, *Attorney General v. Stewart*, 2 Mer. 163; and, consequently, lands may be devised for any uses which are recognized by our law as charitable. It was admitted, however, by Mr. Woods, who contended for the validity of the devise, that it did not fall under the legal designation of charitable, and it seems to me it would have been difficult to establish that it did. The term charity receives, in questions of this kind, a peculiar but wide meaning; and although the Statute of Charitable Uses may not be law here, I think that it may be laid down that not only the various objects mentioned in its preamble, such as gifts and devises for poor people, for sick and maimed soldiers and sailors, for schools, education and learning, for the repair of churches, bridges, and other public works, and for other purposes which it is unnecessary to enumerate, but also, as in England, all objects having any analogy to such uses, would be regarded as charitable. Lord Cranworth said in the case of

the *University of London v. Yarrow*, 26 L. J. Ch. 430, that every object beneficial to the community is a charity in the legal sense of the term; it is wide enough, at all events, to comprise gifts for the support and diffusion among men of every kind of religion, provided it be not immoral, or cruel, or otherwise against public policy. It was held, for instance, by Lord Romilly, that a legacy to print and propagate the writings of Johanna Southcote, was a good charity, as, however, foolish they might be deemed by most persons, they were neither immoral nor irreligious, and were designed by the testator to confer a benefit on the community, *Thornton v. Howe*, 31. L. J. Ch. 767; and I do not doubt that the validity of a bequest for the maintenance or propagation of any Oriental creed, or for building a temple or mosque, or for setting up or adorning an idol, as in an Indian case mentioned by Mr. Woods, would be determined in this Court on the same principle, and with the widest regard to the religious opinions and feeling of the various eastern races established here. I make these remarks, not because they are necessary to the decision of this case, but to guard against my present judgment being misunderstood as questioning the validity of any eastern charity. In the case before me, however, the devise is plainly not charitable; it has not any charitable object whatever, whether general or special, in the sense of a benefit to any living being. Its object is solely for the benefit of the testator himself; and although the descendants are supposed incidentally to derive from the performance of the *Sin-Chew* ceremony the advantage of pleasing God and escaping the danger of being haunted, those advantages are obviously not the object of the testator, nor if they were, would they be of such a character as to bring the devise within the designation of charitable, as used in our Courts in reference to such subjects.

But if the devise is not a charity, on what ground can it be supported? It is clear that in England it would be void. In *West v. Shuttleworth*, 2 M. & K. 684, Lord Cottenham held that bequests to Roman Catholic priests and chapels, in order that the testatrix and her deceased husband might have the benefit of their prayers and masses, were void, and the same question has been since decided in the same way in *Heath v. Chapman*, 23 L. J. Ch. 947, and *Blundell's Trusts* in 31 L. J. Ch. 52. As Lord Cottenham observed, there was nothing of charity in their object; they were not intended for the benefit of the priests personally or for the support of the chapels for general purposes; and they could not, therefore, be supported as charitable bequests. It is true, the legacies are in all those cases spoken of as void because superstitious; but as Sir W. Grant observed in *Cary v. Abbot*, 7 Ves. 495, there is no statute making superstitious uses or bequests void generally. The Statute of 1 Ed. VI. c. 14 relates only to superstitious uses of a particular description then existing, and the 23 Hen. VIII. c. 10, which was intended to guard against the loss suffered by feudal superiors through alienations in mortmain, rather than to check the spread of superstition, relates only to assurances of land to churches, chapels and corporate or quasi corporate bodies, for longer terms than twenty years. Besides,

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when *West v. Shuttleworth* was decided, the dogmas and practices of the Roman Catholic religion had ceased to be superstitious in the eye of the law. The 2 & 3 W. III., c. 115, had placed it on the same footing as other forms of Christianity, dissenting from the established one, in respect of their schools, places of worship, and charities; and a bequest for the repair of a Roman Catholic Chapel, or the propagation of the Roman Catholic religion, was as valid as one for repairing a Protestant Parish Church, or spreading the Protestant faith, *De Windt v. De Windt*, 23 L. J. Ch. 776; *Bradshaw v. Tasker*, 2 M. & K. 221. Lord Cottenham, indeed, referring to some early authorities collected in *Duke on Charitable Uses*, observed that the Act of Ed. VI. had been considered as establishing that legacies to priests to pray for the soul of the donor were within the superstitious uses intended to be suppressed by that Statute; but the effect of his decision was, that they did not fall within that Act; for if they had, the illegal legacies would have been forfeited to the Crown, instead of being as they were, held distributable among the next of kin. But, however, this may be, it seems to me that all such legacies, whether they be designated superstitious or otherwise, are void upon another ground, viz., that not being for a public or *quasi* public benefit, they attempt to create a perpetuity. On this ground, a legacy to keep in repair the testator's tomb has been repeatedly held void, *Rickards v. Robson*, 31 L. J. Ch. 897; *Lloyd v. Lloyd*, 21 L. J. Ch. 598; *Fowler v. Fowler*, 33 L. J. Ch. 674; *Hoare v. Osborne*, 35 L. J. Ch. 345. On the same ground, a devise of and to the trustees of a library established and kept up for purchasing and preserving books for the subscribers, was held void, *Carne v. Long*, 29 L. J. Ch. 503 [a]; and Lord Campbell intimated in the case of *Thompson v. Shakespear*, *id.* 278, that a bequest of money to erect and keep up a museum at or near Shakespear's house, as a monument to the poet's memory would be void, "as a perpetuity, not being a charity." These words, indeed comprise the law on the subject. The law of England, as I understand it, does not allow the owner of property, whether real or personal, to dispose of it for all future ages as he desires except in one case, and that is when his object is of some general benefit to man, or charitable, in the legal sense of the word. He may not settle either money or land on his children or descendants or other persons except for the limited period of lives in being and twenty-one years beyond; still less may he devote his property in perpetuity of his own supposed private benefit, or for any other purpose not charitable. On this ground alone, and not because the law condemns as unsound the theological dogma which such a legacy implies, [for the Acts of 23 Hen. VIII. and 1 Ed. VI. are not, in my opinion, law in these Settlements,] I should consider a bequest for masses for departed souls, void, and the devise in this case void, unless the law of these Settlements differs in this respect from the law of England. It remains to consider this question.

[a] See *Beaumont v. Oliviera*, 4. L. R. Ch. Ap. 314; *Trustees of British Museum v. White*, 2 S & S. 594.

In this Colony, so much of the law of England as was in existence when it was imported here, and as is of general [and not merely local] policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them. Thus in questions of marriage and divorce, it would be impossible to apply our law to Mahomedans, Hindoos, and Buddhists, without the most absurd and intolerable consequences, and it is therefore held inapplicable to them. Tested by these principles, is the rule of English law which prohibits perpetuities either of local policy, unsuited to an infant settlement, or inapplicable by reasons of the harshness of its operation, to people of oriental races and creeds? The rule is not founded by any statute, but is a rule of the common law, and it seems to me to be one of a general and fundamental character, of great economical importance, and as well fitted for a young and small community of a great state, for both are interested in keeping property, whether real or personal, as completely as possible an object of commerce, and a productive instrument of the community at large. I am, therefore, of opinion that in this Colony it is not lawful to tie up property and take it out of circulation for all ages, for any purpose not of any real or imaginary advantage to any portion of the community, and if the rule against perpetuities be law here, it might suffice to add that as the property in question in this present case is chiefly, if not wholly real, the rule must apply to it invariably, whatever may be the creed, race, or nationality of its owner, on the ground mentioned in *Story Conf. L.*, sec. 440, that it is out of the question to subject property of that nature to any but the local law, and thus introduce in our own jurisprudence the innumerable diversities of foreign laws. But waiving this point, if it be said that such a restriction on the power of impressing on property, the will of its present owner *in perpetuum*, is unjust or oppressive to the natives of the east, I should desire some proof or illustration of such an effect. There is, I believe, nothing in Chinese law, or customs, certainly, I had no evidence of it,—which requires the owner of property to dispose of any part of it for the use of his own soul after death. It has not even been shewn that such a devise would be valid in China, or indeed that the power of testamentary disposition is known there at all. No similar devise appears to have been ever brought under the cognizance of the Court of these Settlements, though one of them, Penang, has been under British rule and inhabited by Chinese for upwards of eighty years; and surely if a devise in fee for the use of the testator's soul was dictated by some imperative religious obligation, the question now before me would have been raised and decided long ago. Certainly it would require very strong evidence to establish that it was regarded as a duty, in any religion, to disregard the claims of natural affection, and, as in this case, to dispose of the bulk of one's property in providing for the supposed benefit and comfort of his own soul, while he left his sons and daughters almost

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wholly unprovided for. As there is no such evidence, I am unable to see any reason for holding that the rule against perpetuities is less applicable to property in the hands of a Chinese and a Buddhist than to property in the hands of an Englishman and a Christian, and I think that the former has no power to devise or bequeath property to be devoted in *sæcula sæculorum* to any purpose not charitable.

For these reasons, I think this devise void, and that the property is distributable among the testator's next of kin living at his death.

GAN GUAT CHUAN & ORS. v. KHO SU CHEANG.

PENANG.

A partner may use the names of his co-partners in legal proceedings, and they cannot stay proceedings or get their names struck off; but the partners who object have a right to be indemnified against costs.

HACKETT, J.
1869.

February 24.

This was an action on the common money counts.

Lim Cheng Yean, one of the plaintiffs, having obtained a Rule calling upon the other plaintiffs, his partners, to shew cause why his name should not be struck out as a plaintiff in this suit,

R. C. Woods, junr., shewed cause, and contended that this being a joint contract, the petitioner's name must continue on the record, on his receiving an indemnity from the other plaintiffs against costs, and cited *Whitehead v. Hughes*, 2 Dowl. P. C. 258, and *Auster v. Holland*, 10 Jur. Q. B. 786.

The petitioner in person, heard *contrà*.

Hackett, J. held that the petitioner's name must be continued on the record, as the contract was a joint one, but that he was entitled to be indemnified, on account thereof, by the other plaintiffs, as to costs, and discharged the Rule with costs.

Rule discharged with costs. [a]

In re ISAAC SWINBURNE BOND.

The term "fees" in legal phraseology, means perquisites allowed to public officers as a reward for their trouble.

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Where therefore, in the table of fees published with the Order in Council of 6th March, 1868, purporting to be made under Ordinance XII. of 1867, s. 1., was an item as follows, "Admission of an Advocate \$50,"

Held, this was not a "fee" and not one within the powers of the Executive Council, under the said Act, to pass. [b]

This was a Rule *Nisi* obtained by *Bond* against the Registrar of the Court, calling upon him to shew cause why he should not certify that certain stamps to the amount and value of \$50, demanded by him from *Bond* on his admission as an Advocate and Attorney of the Court, as fees leviable under the Order of the Governor in Council, dated 5th March, 1868, and by him [*Bond*]

[a] Where one of several plaintiffs dissents to bringing the action, the Court will not interpose, unless upon a suggestion of fraud. *Emery v. Nucklow*, 10 Bing. 23, S. C. 2 Dowl. 735; also see *Drake v. Symes*, 30 L. J. Ch. N. S. 358.

[b] By Ord. V. of 178, s. 18, this charge can now be legally made.

paid under protest, were fit subjects for allowance under the 3rd clause of section 30 of Ordinance XXVI. of 1867, commonly called the Stamp Act.

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D. Logan, [*Solicitor-General*,] for the Crown. The fee is legal. It was lawfully fixed by the said Order in Council by virtue of section 1 of Ordinance XII. of 1867 [a]. The Governor has power thereby to fix or create any new fee in this Court as fees were *leviable by law* therein before the passing of this Ordinance under the Charters of the Court of 1807, 1827 and 1855 [b]. The question before the Court is not whether the Governor in Council has power to create a fee in any *new* office or department that may be established after the passing of the above Ordinance, unless the Legislature expressly gives authority to make and levy fees therein, or whether the Governor in Council has authority to create new fees in departments where no fees were *leviable by law* at the time of the passing of the said Ordinance. Here, fees had been *leviable* under the Charters, and had been levied for years, and there was no objection to the Governor fixing this new fee although it had never been charged before. It could *not* be the intention of the Legislature that the Governor should simply fix the same table of fees as was already in existence, and give him only the power to increase or decrease the amount of the sums then *leviable*. By the Supreme Court Ordinance V. of 1868, [passed 8th June, 1868,] the process and practice of this Court had been changed, yet could it be contended that the Governor in Council had no power to fix new fees for additional process under this Act? The words of the Ordinance are "to fix tables of fees . . . and "from time to time to alter and amend such tables of fees," which are of the same import as the words "settle a table of fees and from "time to time vary the said table of fees," used in the Charter under which all the fees levied in the Court were created. It could not be said that the Colonial Legislature had no power to pass such an Ordinance as Act XII. of 1867, on the ground of its being unconstitutional to part with the power of taxation, or on the principle of *Delegatus non potest delegare*, neither was the new fee an unreasonable one. The words "to be *leviable*" in Act XII. of 1867 were probably intended to apply to fees which might after the passing of the said Ordinance be *leviable* in any public Office or Department, whether in existence or to be hereafter formed and in which no fees were at the time levied. Section 29 of the Stamp Ordinance, XXVI.

[a] "It shall be lawful for the Governor in Council to ~~fix~~ tables of fees and of "payment for licenses, *leviable or to be leviable* in all Courts of Justice, Public Offices "and Departments in the Colony, and from time to time to alter and amend such tables "of fees and payments for licenses, and from and after the coming into operation of any "table of fees so fixed, no fee other than those so fixed shall be payable for any matters therein contained: *Provided always, that no fees or payments for licenses in "excess of the maximum rate fixed for any purpose by an Act of the Legislative "Council shall be chargeable under any tables fixed by virtue of this Act."* Section 1 of Act XII. of 1867.

[b] "And we do hereby further authorise and empower the said Court of Judicature to *settle* a table of fees to be allowed to such Registrar, Sheriff and Coroner "for all and every part of the business to be done by them respectively, which fees the "said Registrar, Sheriff and Coroner shall and may carefully demand and receive, and "we do further authorise the said Court from time to time to vary the said table of fees "as there shall be occasion." See 2nd Charter, p. 18.

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of 1867 [a], confirmed the legality of this fee, and so did sec. 4 of the Supreme Court Act V. of 1868. The power given by the Act to the Governor in Council was not unlawful nor unusual as testified by numerous Imperial Statutes and Colonial Ordinances: and sec. 30 and 31 Vict. c. 89. Weekly Notes, Law Reports, No. 4, 1869 [Orders]. It differs entirely from a power to levy taxes. It applies only to fees to be taken in public offices for service rendered therein.

Bond, contra. The fee is illegal. The preamble of Act XII. of 1867 declares that it is "to regulate the levy and payment of fees, &c.," and does not express that this Ordinance was one to amend, vary or alter the then existing laws or fees, or that it was expedient to create new offices or new fees. This Act must be judged by its preamble, *Broom's Legal Maxims*, 509, 510. The Order in Council of 5th March, 1868, misrecites the Act and uses the words "to be levied," which assumes the question. It could never be the intention of the Legislature to grant unlimited power of taxation to the Executive, and the words "to be leviable" in the Act clearly demonstrates the contrary intent, otherwise why should they have inserted the words? By those words they must be considered to have meant that where new fees were deemed necessary, they should be consulted ere such a tax could become legally leviable. This fee was not leviable by law. The Charter of the Court of 1827 empowered the Court to "settle" tables of fees, which was a word of greater import than to "fix" fees "leviable or to be leviable" as declared in Act XII. of 1867. The words of the Charter of 1855 which supersedes the Charter of 1827 are much more limited. The 29th section of Act XXVI. of 1867 clearly explains the intention of the Legislature as to the Fees Act, for they therein declare that only such fees as are "payable under any law" may be levied. Can it be said that this new fee of \$50 is so payable under any law? There is no law that ever authorised it. There was no such fee in the tables of fees under the Charters of the Court. If the view that the Governor had power to create new fees was correct, then he might do so *ad libitum* and without any restraint. But it could not surely be the intention of the Colonial Legislature to betray their trust in that manner and to part with the right of taxation which belongs solely to them. *Broom's Constitutional Law*, 339, 407. *Bowyer's Constitutional Law*, 204, 429. *Broom's Legal Maxims*, 4, citing *Gosling v. Veley*, *Burder v. Veley*, *Denn v. Diamond*. *Locke on Government*, c. 11. The language of the Legislature was clear and unambiguous that the fee must be one leviable by law or to be made leviable by law. In this case the new fee of \$50 was not supported by any law, but was an illegal demand. If, however, the words were ambiguous, then the subject should benefit by any

[a] "Whenever the Governor shall direct by Order in Council under Act XII. of 1867, that any fees payable to Government in any Court, Office or Government Department in the Colony, or any payments for licences under any law, shall be payable by means of Stamps, such Order in Council shall set out a table of such fees, or payments for licences, and on and after the publication of such Order in Council this Act shall be read as if such table of fees or payments for licences had formed a part of this Act." Section 29 of Act XXVI. of 1867 [*Stamp Act*.]

such ambiguity as this fee was in the nature of a penalty and therefore odious in the eye of the law, *Vattel's Law of Nations*, 262, 268. *Duarris Stat.*, 551, 564, 587, 594, 646. *Re Micklethwaite*, 11 Exch. 456, *Ryder v. Mills*, 3 Exch. 869. *Broom's Legal Maxims*, 508. It must be remembered that fees levied in the different public offices are not appropriated to those offices, but go to the general revenue of the Colony. There was no inherent power in the Governor to make new fees, and he can have none unless it is granted to him by some legislative enactment, expressed in clear, distinct and unambiguous language.

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December 21. *Hackett, J.*—This was a case upon a Rule calling on the Registrar of the Supreme Court to shew cause why he should not certify that certain stamps to the amount of \$50 demanded by him from Mr. Bond, on his admission as an Advocate and Attorney of the Court, as fees leviable under the order of the Governor in Council of the 5th March, 1868, and by him, Mr. Bond, paid under protest, were fit subjects for allowance under the 3rd clause of the 30th sec. of the "Stamp Act, 1867," and the question for my decision is, whether the said fee of \$50 levied on the admission of an Advocate in the Supreme Court according to the said Order in Council, is a legal fee, Mr. Bond contending that it is not.

The Solicitor-General on behalf of the Government has waived any objection that might have been made to the form of the application. The question arises upon the construction of sec. 1 of Act XII. of 1867, by which it is declared that "it shall be lawful for the Governor in Council to fix tables of fees leviable or to be leviable in all Courts of Justice." The argument before me turned principally in the meaning of the words *fix* and *leviable or to be leviable*. Now, as to the word *fix*, I think, it was clearly used in the sense of settle or establish, and that the words, "fix table of fees" are to be construed in the same way as the words "settle a table of fees" in the Court Charter of 1827.

Then come the words *leviable or to be leviable* upon which much stress was laid by Mr. Bond, and on which in fact his argument was principally based. It was contended that these words imported that the Governor was not empowered to create any new fee but was merely to settle the amount of an established fee, and that to make a fee legal it must be leviable by law, independently of the Governor's order: in effect, that he might raise or diminish the amount of an established fee at his pleasure, but that he has no power to impose a fee on a matter in respect of which a fee should not be leviable by law independently of the Governor's order. But I confess I am not prepared to agree to this contention. It is perhaps difficult to understand what is really meant by the word in question, but I am relieved from the difficulty of deciding their meaning by the view which I take of this case, and I will assume for the moment that they are merely a cumbrous mode of expressing the same meaning as "to be levied" which indeed is the expression used in the Order in Council.

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Assuming then that the Governor in Council is empowered to fix tables of the fees to be levied in Courts of Justice, we come to the question, what fees is he entitled so to fix? Are his powers as unlimited as by the terms of the Act they at first sight appear to be? Has he an unrestricted right to impose payments in respect of anything and everything done in Courts of Justice? Is he empowered for instance to demand a fee from every person entering a Court, or to impose payment of a fee on every one acting as a jurymen or giving evidence as a witness? These instances are, no doubt, *reductiones ad absurdum*, but they are a fair mode of testing the meaning of the words, and they serve to shew that the Governor's powers must be confined within certain limits. It would be unreasonable to suppose that the Legislature intended to bestow on the Executive, powers which, construed literally, might be carried to such extravagant lengths.

Now what are the fair and reasonable limits of these powers, and is it possible to ascertain them with any certainty? I think that it is, and that a solution of the difficulty is to be found in the true meaning of the word "fees" as it is used in Courts of Justice. If the expression "fees in Courts of Justice" is always found to be used in one sense in the law books, I think it is a fair inference that it must be construed in the same sense in the Act which I am now considering.

Now, I believe it will be found that this is so, and that "fees" in Courts of Justice are always used to express, the perquisites "allowed to officers who have to do with the Administration of Justice, as a recompense for their labour and trouble." This is the definition given in Bacon's Abridgment, a book of considerable authority. In Co. Litt. 363 b., it is said that such reasonable fees as have been allowed by Courts of Justice to inferior ministers and attendants for their labour and attendance if asked and taken of the subject, are no extortion. In *Ballard v. Gerrard*, 12 Mod. 608, Holt, C. J. said: that a Court cannot create new fees for its officers so as to be binding on the subject, though it may adjudge what are reasonable fees.

I think, therefore, we may assume it to be clear that fees are, properly, perquisites allowed to the officers of a Court as a reward for their trouble, and that any imposition or charge upon persons who have to do with the Court, in order to be rightly included in the category of fees, must be the recompense for work done by the officers of the Court. Accordingly we find that the framers of the Court Charter of 1827, in conferring on the Judges the power of settling the fees of Court, were careful to define the power in exact terms, and to limit it to the "fees to be allowed to the Registrar, Sheriff and Coroner, for all and every part of the business to be done by them respectively." The limits thus affixed to the power of the Judges in the creation of fees, are those which are as well recognized by authority, as they are governed by a sound principle, namely, that fees are the recompense for work done by the officers of the Court. If I am right in my opinion of the meaning of the expression "fees in Courts of Justice," as used in the Act of 1867, I have only to apply the test to the fee which

is now in dispute, and see if it falls within the proper meaning of the word "fee" as I have defined it. And I confess I do not think it does. The heading of the table of fees is "Supreme Court," and it is not a little curious that this heading is not strictly correct, inasmuch as at the date of the Order in Council [6th March, 1833] the proper style of the Court was "the Court of Judicature of Prince of Wales' Island, Singapore and Malacca." However, no point was made of this, and I will assume that the heading was intended to apply to the Court which was the Supreme.

Then follow the words which stand first in the list of fees:—"Admissions of Advocate \$50." Now is this charge a fee properly so called? Is it the recompense for the labour or trouble of any of the officers or ministers of the Court? I think not. As the words stand, they seem to me more in the light of a tax levied for the concession of the privilege of appearing in Court as an Advocate, than as a payment for services rendered by the officers of the Court. By a parity of reasoning, the fee payable for the certificate of admission as an Advocate would perhaps be a good fee, but that question does not arise in the present case.

I confess I have had considerable difficulty in forming an opinion on this case, owing to the very general and consequently ambiguous terms used in the Act which I had to interpret, illustrating strikingly the adage "error lies in general," but I have less diffidence in pronouncing my decision, from the knowledge that my learned brother, Sir Benson Maxwell, concurs in the conclusion at which I have arrived.

Upon the whole, I am of opinion that the charge of \$50 on the admission of an Advocate, in the table of fees of the 6th March, 1867, is not properly "a fee in a Court of Justice," and therefore that it cannot be supported.

CHALLIS v. CRAMER.

Plaintiff was the charterer of a ship, which he chartered at 24 sh. per keel, "in full of all charges, wharfage and other dues," and loaded her with a cargo of coal for Singapore. He contracted to sell the coal to defendant, at 36 sh. per ton to be "delivered alongside any craft, floating dōt, steamer or wharf, as buyers may direct, and in full of all charges." On the ship's arrival at Singapore, the defendant [the purchaser] directed that she should go alongside the Borneo Company's Wharf, which she did, and there delivered her cargo of coal which was received by the Company on the defendant's account, and warehoused by them. The Company charged the defendant with [among other things] wharfage, which he paid and subsequently claimed to deduct [and retained] from the price of the coals to be paid the plaintiff, alleging that by the terms of the contract, he [plaintiff] was liable therefor: the plaintiff refused to submit to this and commenced an action for the recovery of the amount retained.

Held, that the plaintiff was not liable for the wharfage, as on the true construction of the contract, the words "in full of all charges" meant, that the ship [plaintiff] could make no charge which it might otherwise have been entitled to, such as labour for taking the coal out of the hold, harbour dues, &c., and not that the ship-owner or charterer would defray expenses falling immediately on the purchaser [defendant] by his voluntary act.

Held, further, that wharfage is a charge on the skipper or consignee of goods, and not on the ship, and so properly fell on the defendant.

Held also, that the contract of sale, though annexed to the charter-party, could not be construed in conjunction with the latter, and the expression in the latter "full of all . . . wharfage," did not explain the words "in full of all charges" in the contract of sale.

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February 2.

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—
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Action to recover \$372, balance for goods sold and delivered. Plea—first, payment; second, set off for money paid by defendant for plaintiff, at his request, as wharfage due by the plaintiff to the Borneo Company, Singapore. Issue thereon. The facts sufficiently appear in the judgment.

A. M. Aitken for plaintiff.

Davidson for defendant.

Cur. Adv. Vult.

On this day judgment was delivered by

Maxwell, C. J.—The plaintiffs, being charterers of the ship *Wallace*, at a freight of 24sh. per keel “in full of port charges, “wharfage and other dues,” contracted to sell a cargo of coal to the defendant at 36 shillings per ton “delivered alongside any craft, “floating depot, steamer or wharf at Singapore, as buyers may direct, and in full of all charges.” It was also provided that the purchasers should have the option of discharging at two wharves, the coals to be delivered at not less than 45 tons daily as per charter-party annexed. On the arrival of the ship, she went, by the defendant’s direction, to the wharf of the Borneo Company, where she discharged the coal, which was then carried to the Company’s stores and stacked. The Company charged the defendants with wharfage as well as for warehousing, and the defendants paid the amount of the former claim, 372 dollars, which they deducted from the price of the coal, in settling their account with the plaintiffs. The plaintiffs objected to the deduction, contending that they were not bound to pay for the wharfage, and this action has been brought to recover the sum so deducted.

It seems to me that the meaning of the contract to deliver the cargo alongside “in full of all charges” is, that the ship would make no charge which it might otherwise be entitled to make, but not that the ship-owner or charterer would defray expenses falling immediately on the consignee by his own voluntary act. It is so improbable and so unreasonable that the ship-owner should undertake to pay a debt incurred by the merchant, while it is so reasonable that he should limit his own demands on him, that nothing short of the clearest language would justify the former construction, while if the terms of the contract were susceptible of doubt, the latter would be the natural meaning to put upon it. The question then arises, whether the charge for “wharfage” is a charge on the ship or on the cargo. Mr. Buchanan, the Manager of the Borneo Dock Company, said that in the case of general ships he charged the ship, but otherwise the goods, but whatever may be the practice of those wharfingers in this respect, I think that wharfage is a charge on the shipper, or the consignee of goods for the facilities afforded in loading or unloading them. The charge is not proportioned to the size of the ship or the length of time that she lies alongside, but to the quantity of goods loaded and unloaded. In *Stephen v. Costa*, 1 W. Bl., the Act of Parliament which gave rise to the question shewed that the charge fell on the goods, or the owner of them; and is clear from such cases as *Syeds v. Hay*, 4 T. R. 260, and *Bourne & ors. v. Gatliffe, M. & Gr.*, p. 850, that wharfage is a charge on the goods. It was not disputed that if the defendants

had taken lighters to the ship's side for the coal, the ship would not have been bound under this contract to pay the hire of them, and though there may be a little more obscurity in the case of a delivery on a wharf, because the ship is taken to the place of discharge, and has also incidentally the advantage of being moored, and perhaps some more than ordinary facilities in delivering her cargo, the same principle applies. It depends on the fact that a ship-owner, unlike a carrier by land, is not bound to seek the consignee and deliver the goods to him at his abode or warehouse, but that it is the business of those who send goods by sea and those to whom they are consigned, to go to the ship with them or for them. In the present case, it was for the defendants, on the arrival of the ship, to take receipt of the cargo at the ship's side. The ship was bound to deliver it to them there "in full of all charges," that is, without making any charge for the labour of taking it out of the hold, or perhaps for harbour dues, moorage or other charges, but it was the duty of the defendants to receive it at the ship's side, and whether they used a lighter or a wharf for the purpose, the cost would fall on them, and I see no intention in the contract that the ship should indemnify them for it. In coming to this conclusion, I have not lost sight of the argument of Mr. Davidson, to the effect that inasmuch as the plaintiffs had hired the ship at so much per keel "in full of port charges, wharfage and other dues," and as the charter-party was annexed to the contract now in question, the two instruments ought to be construed together, and the expression "in full of all charges" in the one ought to be construed as in full of the *wharfage* and other charges mentioned in the other. But I do not think that there is any ground for construing the instruments together. They are between different persons and relate to a different subject: and the charter-party is referred to merely in relation to the stipulation to discharge 45 tons daily. Besides, it may be a question whether the term *wharfage* is not used in a different sense in the charter-party, whether it does not refer to some charge analogous to moorage or anchorage, which might be charged in a ship for the accommodation it obtained in being secured alongside a wharf, whether loaded or unloaded.

But if I am wrong in the view which I have taken, and the charge for wharfage falls primarily on the ship, and is not a charge on goods, the defendants must still fail in this action, for they would have paid the wharfage of their own wrong: the Borneo Dock Company would have had no lien on the coal for it, and the defendants could not, by paying it, constitute themselves the creditors of the plaintiffs, or claim to set off the amount in paying their debt to them.

For these reasons, the judgment must be for the plaintiffs.

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April 8.

B, [the plaintiff], a manufacturer of gunpowder in Scotland, sent certain large quantities of gunpowder to M. & Co. of Singapore, factors, for sale. M. & Co. on receipt of the powder, having no magazine to place it in, placed the same on board a powder hulk called the "S." belonging to K. [the defendant]: shortly after, the "S." being found to require extensive repairs, all the powder on board her, including B's was transferred on board the "P. R." another powder hulk belonging to one H; in two or three days thereafter, the "P. R." having sprung a leak, went down with all powder on board, including B's. B. [the plaintiff] then sued K. [the defendant] for the value of the powder lost to him, *firstly* [in four counts] for non-delivery of the powder as on a contract of bailment, *secondly*, [5th count] for negligence, as a bailee of the powder from the plaintiff, *thirdly*, [6th count] for negligence as bailee of the powder belonging to the plaintiff, *fourthly* [amended 7th count,] for trover of the powder.

Held, the plaintiff could not maintain the action on either count, not on the first four counts, as there was no privity of contract between B, the plaintiff, and K, the defendant, — not on the 5th count as K, the defendant, never received the powder from B, the plaintiff, and owed him no duty to safely keep the powder, — not on the sixth count, as the owners and crew of the hulk "P. R.", in which the powder went down, were not the servants and agents of K, the defendant, — and not on the 7th count, as even if there was negligence on the part of K, the defendant, still there was no evidence, on above facts, of a conversion by him of the powder.

Action for damages for negligence, and wrongful conversion of goods. The facts and points are fully set out in the judgment.

Atchison, for plaintiff.

A. M. Aitken, for defendant.

Cur. Adv. Vult.

On this day judgment was delivered by

Maxwell, C. J.—In stating the grounds of my decision in this case, it will be convenient to begin by stating the facts as they appeared in evidence. The plaintiffs, manufacturers of gunpowder in Scotland, sent a quantity of gunpowder for sale on commission, to Messrs. Macdonald & Co., who are merchants and factors in this place. That firm has no warehouse or magazine for storing gunpowder; and at the time when the facts of this case occurred, there were but two places where that commodity could be lawfully stored, *viz.*, two hulks lying beyond the limits of the harbour, the *Statesman* and the *Princess Royal*. On the arrival of the plaintiffs' powder, towards the end of 1867, Macdonald & Co., deposited it with the defendants, who are owners of the powder hulk *Statesman*, for safe keeping in their hulk. Early in February, 1868, it was discovered that the *Statesman* was in need of repairs, and the defendants entered into an arrangement with the owners of the *Princess Royal* for warehousing in the latter vessel all the gunpowder in their keeping, for 250 dollars a month until the repairs should be completed. In pursuance of this contract, the gunpowder stored in the *Statesman*, including that belonging to the plaintiffs, was transhipped on board the *Princess Royal*, on the 14th and 15th of February. On the 16th, the *Princess Royal* sprang a leak and sank at her moorings, whereby the plaintiffs' powder was destroyed or lost. This misfortune, it is said [I need not express an opinion on the point here], [a] was owing to the negligence of the servants of her owners.

[a] In the previous case arising out of this same occurrence, it was held, *this was so*.—See *Martin, Dyce & Co. v. Hodgson*, *ante* page 190.

Under these circumstances, the plaintiffs have brought an action against the owners of the hulk in which it was warehoused by Macdonald & Co. The first four counts of the petition allege, with unimportant variations, that the defendants contracted with the plaintiffs to keep safely and redeliver on request, for reward, certain gunpowder. The 5th count alleges that the plaintiffs delivered the powder to the defendants to be safely kept by them for reward, and that the defendants kept it negligently, whereby it was lost; and the sixth, that the powder was received by the defendants, as storekeepers, to be safely kept, and that it was lost by their negligence. In the course of the hearing, the counsel of the plaintiffs applied for leave to add a count in trover; and assuming that the petition contains such a count, I have to consider whether this action is maintainable on any of the counts.

To recover on any of the first four, it is necessary to prove a contract between the plaintiffs and the defendants for the keeping of the powder. It was contended on behalf of the former, that Macdonald & Co., in contracting with the defendants, contracted as agents and on behalf of the plaintiffs, and that the plaintiffs were consequently entitled to sue on the contract; and unquestionably if this were so, it would be no answer for the defendants to say that they were ignorant of the existence of a principal, when they dealt with Macdonald & Co. But was the contract really made for the plaintiffs? This does not follow simply from the fact that Macdonald & Co., were their agents for the sale of their goods. There was no evidence of any instructions from the plaintiffs to Macdonald & Co., to enter into any such contract for them; and their relative rights and duties shew clearly that Macdonald & Co., must have contracted for themselves and not as the agents of the plaintiffs. Macdonald & Co., were factors, or commission merchants; the plaintiffs employed them, as such, to sell their powder and they consigned it to them, and thus placed it in their possession. Under those circumstances, whose duty was it to warehouse the goods? Clearly, it was the duty of Macdonald & Co. Factors are responsible for the safe keeping of goods consigned to them in the way of their business, and they are liable to their employers for any negligence in the discharge of this duty. In general, the duty is personal; but reasonable convenience, and attention to the benefit of their employers, justify them in delegating the custody of the goods to another, provided due care be taken to select a proper depository. *Paley on Ag.* 17. On the other hand, factors have a special property in the goods entrusted to them; they have a lien on them, as long as the goods remain in their possession, for their disbursements and liabilities incurred for their employers. If Macdonald & Co., had placed the powder in their own warehouses, it would not have been doubted that they had done so in pursuance of this ordinary duty of their business,—or that the powder was in their possession as factors, and not, in contemplation of law, in that of the plaintiffs, and that they had a lien upon it; and I see nothing in the case to lead to the belief that in storing the powder in the hulk, they intended to alter their own legal position towards the plaintiffs, to part with

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their own rights over the goods, or in short to do anything more than delegate the custody of the goods entrusted to them, which they could properly do in this case, since the law of the place made it imperative. Any provision, indeed, by or on behalf of the plaintiffs for warehousing the goods, would imply that the possession continued in themselves; it would be inconsistent with the possession being in Macdonald and Co., and inconsistent with their lien for their charges and disbursements. In short, it would be to hold that they were not factors in the transaction. But this is plainly contrary to the fact. I think it clear, therefore, that the *contract of bailment* made by Macdonald & Co., with the defendants, was made for themselves personally and not on behalf of the plaintiffs, and it follows that the latter, being strangers to it, cannot sue upon it. The first four counts therefore cannot be sustained.

The fifth count is open to the same remarks; the powder was not delivered by the plaintiffs to the defendants, as alleged; the plaintiffs did not employ them as warehousemen; they did not hold the goods for the plaintiffs, but for Macdonald and Co., and they had *no duty to the plaintiffs* to perform in respect of the safe custody of the powder. The mere fact that the powder was the property of the plaintiffs cannot affect the position of the defendants in this respect; *per Parke B. in Tanner v. Scovell*, 14 M. & W. 28.

Taking the sixth count as vesting the liability of the defendants on an injury done to the plaintiffs' property through the negligence of the defendants, *irrespective of any contract or bailment*, or of any *duty* arising therefrom, I think that it also must fail. The defendants can be liable only for their own personal negligence or for the negligence of their agents or servants in the course of their employment. No personal negligence is imputed to them; but it is contended that they are liable for the negligence of the servants of the owners of the *Princess Royal*; and this depends on whether those owners were their servants; for if they were, it may be assumed that the defendants would be liable for the negligence of the persons employed by their servants in the course of the service, just as the owner of a ship is liable for damage done to the cargo, or to another ship through the negligence not only of his master, but of the crew, [*per Littledale, J., in Langher v. Pointer*, 5 B. & C. 554]. But the liability does not extend to the acts or defaults, not expressly ordered, of persons who are not in the relation of servants. The person who hires a cab is not liable for damage done without his orders, by the negligence of the driver in the course of driving; for the driver is not his servant. The owner of a ferry who hires a steamboat and crew from another, to to carry on his business, is not liable for the damage done by the negligence of the crew, for they are not his servants, but the servants of the owner of the steamboat; see *Langher v. Pointer*, 5 B. & C. 547, *Quarman v. Burnett*, 6 M. & W. 499, *Fowles v. Hider*, 6 E. & B. 208, *Dalyel v. Tyrer*, 1 E. B. & E. 899. Here, it is clear that the relation between the defendants and the owners of the *Princess Royal* was not that of master and servant. The latter contracted simply to keep the powder for the former, but this contract did not give the defendants authority to direct the owners of

the *Princess Royal* as to the manner of keeping it. They could not dictate to them how they should stow it, or how many men they should keep on board, or how often they should sound the pumps, and so on. The owners of the *Princess Royal* were simply bailees for hire; and the defendants are therefore not liable for their negligence, or for that of their master and crew.

It remains to consider whether I ought to allow a count in trover to be added to the petition, and this depends on whether such a count could be sustained by the facts of the case; for if it could, I should be bound, for the purpose of carrying out substantial justice, to allow the addition to be made, upon proper terms. But it seems to me that such a count would fail, because there would be no evidence of conversion by the defendants. In trover the plaintiff complains that his goods having somehow come into the possession of the defendant, the latter has converted them to his own use and deprived the plaintiff of them. It is not necessary, indeed, to prove an acquisition of the goods by the defendant for his benefit, for a wilful destruction of them by him would be a conversion, *Keyworth v. Hill*, 3 B. & A. 687; but there is no conversion unless there be a repudiation of the right of the owner, or the exercise of a dominion over the goods inconsistent with that right; *Heald v. Carey*, 11 C. B. 977, *Foulkes v. Willoughby*, 8 M. & W. 540. There was neither the one nor the other in transferring the powder to the *Princess Royal*. In doing this, the defendants had no other motive than to do their best for its protection and safe custody; and if it was an act of negligence on their part to take that step, it would nevertheless be no evidence of a conversion. And the loss of the powder by the sinking of the *Princess Royal* was no conversion of it by the defendants. "There is no doubt," says Mr. Justice Maule in *Heald v. Carey*, "that a negligent dealing with goods by a bailee," and the goods were lawfully in the possession of the defendants as bailees, "is not a conversion; there is no doubt that an act consequent on the negligence of the bailee, in which he did not participate, would not amount to a conversion by him." In *Foulkes v. Willoughby*, Lord Abinger says: "In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed and consumed to the prejudice of the lawful owner." Here, the defendants did not intend the former, and they were strangers to the negligence which caused the destruction of the powder.

The conclusion, then, to which I come, is that the plaintiffs cannot make the defendants responsible to them for the loss of the powder, and that they misconceived their remedy in suing them. The defendants did not contract with them to keep their property safely; they did not owe them any duty to keep it; they did not either personally, or through the agency of any persons for whose acts they are responsible, injure or destroy it, and they did not claim or exercise any dominion over it inconsistent with the rights of the plaintiffs. There must, therefore, be judgment for the defendants.

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1870.

A stranger to a deed, cannot under the deed, seize and sell any thing mortgaged by the deed ; if he do so, he is a trespasser, even though the monies due on the deed be due to the firm in which the defendant was a partner, and though he sold the vessel and applied the proceeds to account of such debt.

December 19. But under the above circumstances, the Court will only give nominal damages, as the plaintiff derived a benefit by the defendant appropriating the proceeds to account of the debt due on the deed.

Query. Whether, if the defendant was a party to the deed, and the deed contained no power of sale, he could avail himself of the deed, without pleading it specially, either on equitable grounds or otherwise ?

This was an action to recover possession of a vessel called the *Sree Mahmoo* together with all her tackle, apparel, &c., or \$3,000, her value, and \$1,200 as damages for her detention.

The defendant pleaded not guilty and not possessed.

R. C. Woods, junr., [with whom was C. W. Rodyk,] for the plaintiff contended that the trover and conversion was clearly made out. That the agreement purporting to be a mortgage and on which the defendant relied, could afford no answer as it contained no power of sale ; and moreover, it was a deed made between the plaintiff and Lim Hean and Lim Ho, and not with the defendant. The defendant at the time, he sold the vessel, was not the Executor or Administrator of either of these persons ; he was a mere stranger to the deed, and could not under it seize and sell the vessel.

Bond, for the defendant, contended that as the defendant was a partner with Lim Hean and Lim Ho under the name or firm of "Seng Huat," and the deed being made with the last named persons, as partners of that firm, the defendant though not named, could act under it, and seize and sell the vessel. The omission of the power of sale in the deed would not make the defendant a trespasser. *Maxwell v. Chettyapah Chetty* [a] ; *Fisher on Mtges.*, 776 ; Act XXVIII. of 1866, Sec. 6.

Woods in reply, contended that the defendant being only a partner, would not in any way justify his conduct, as he was a stranger, and a stranger cannot sue on a deed, and if he could not do this, no more could he under the deed, seize and sell the vessel.

Hackett, J., held that the defendant, being a stranger to the deed, could not act under it, and that his being a partner with Lim Hean and Lim Ho, the two persons named in the deed, could in no way help him ; but as the defendant was under the impression that he had a right to seize and sell the vessel, and apply the proceeds to account of the monies due on the deed, and had also fulfilled such intention, by which the defendant derived a benefit, he would only give nominal damages. [b]

Judgment for plaintiff with one cent damages, and costs. [c]

[a] See ante page 201.

[b] See *Edmondson v. Nuttall*, 34 L.J. C.P. [N.S.] 102.

[c] See *Lim Cheong & ors. v. Tunku Muda Choot Latiff & ors.*, post, p. 235 and also *Petrie v. Lamont*, Car. & M. 93 ; *Bradford v. Belfield*, 2 Sim. 264 ; *Townsend v. Wilson*, 1. B. & Adl. 608 ; *Prideaux on Convey*, Vol. I., p. 319.

LIM CHEONG, LIM SEANG & ORS. v. TUNKU MUDA
CHOOT LATIFF & ORS.

A stranger to a deed cannot maintain an action on it, though he be a partner of the persons with whom the deed was entered, and the deed was intended to have been entered with the firm in which they were partners. The legal representatives of such persons, are the proper persons to bring the action.

PENANG.
HACKETT, J.
1870.

This was an action to recover the sum of \$2,101.24 for principal and interest due on a deed and on the common money counts. The deed was made by the defendants, with one Lim Hean and Lim Ho, the partners of the plaintiffs.

The defendants demurred to the declaration, the marginal note of the demurrer being as follows: "A matter of law intended to be argued is, that the plaintiffs in this action have no right to sue the defendants in this action, on the alleged deed set forth in the said first count of the plaintiff's declaration."

The plaintiffs joined in demurrer.

R. C. Woods, junr., [with whom was C. W. Rodyk,] in support of the demurrer, contended that the plaintiffs being strangers to the deed could not sue on it. 1 *Chitty's Pleadings*, pp. 3 and 4; *Chitty on Contracts*, p. 54; *Dixon on Partnership*, 239, 240; *Green v. Horne*, 1 Salk. 197; Cro. Jac. 506; B. & L. [3rd Ed.] 230; *Jell v. Douglas*, 4 B. & Ald. 374; *Metcalfes v. Rycroft*, 6 M. & S. 75.

Bond contra, contended that the deed being made with Lim Hean and Lim Ho, the partners of the plaintiffs for the firm, the latter the surviving partners, must bring the action; 2 *Lindley on Partnership*, 1034; B. & L. 134, note; *Jell v. Douglas*, supra. Their legal representatives could not do so; 1 *Lindley on Partnership*, 492; *Mathin v. Crompa*, 1 Ld. Raymond, 340; *Robson v. Drummond*, 2 B. & Ald. 303.

Woods in reply contended that the deed was not made with the plaintiff's firm, but simply with Lim Hean and Lim Ho, and that the words "of the firm of Seng Huat," were merely descriptive of these two persons, and the action must be brought by their legal representatives.

Hackett, J. According to the words of this deed, the plaintiffs the surviving partners, cannot sue on it, and I allow the demurrer with costs: but as an amendment will not prejudice the merits, I allow the plaintiffs to amend their declaration by bringing the action in the names of the legal representatives of Lim Hean and Lim Ho.

Demurrer allowed with costs, with leave to plaintiffs to amend. [a]

[a] Vide *Tunku Muda Choot Latiff v. Lim Seang*, ante p. 234.

LIM CHYE PEOW v. WEE BOON TEK.

PENANG.

HACKETT,
AG. C. J.
1871.

February 28.

The Supreme Court has no jurisdiction either on its Civil or Ecclesiastical side, to entertain a suit for restitution of conjugal rights among non-christians.

The 23rd Section of the Courts Ordinance V. of 1868, only gives the jurisdiction the old Court of Judicature had under the Charter of 1855, which was the jurisdiction of the Ecclesiastical Court at home, and which was confined to Christian marriages.

The nature and facts of this case sufficiently appear from the judgment.

Bond, for the defendant. The parties are Chinese. The Chinese are allowed polygamy, and the Court cannot therefore entertain a suit for restitution of conjugal rights. *Hyde v. Hyde* and *Woodmansee*, 1 L. R. Prob. & Divorce, p. 130; *Ardaseer Cursetjee v. Perozeboyee*, 10 Moore P. C. 375.

C. W. Rodyk, for the plaintiff. The cases have been brought on the Civil side of the Court, and such suits have often been entertained. *Toh Lye v. Keng Neoh*, Dec. 1866 [a]; *Mahomed Hashim v. Katijah Bee* [a]; *Reg. v. Loon* [a]; *Ex-parte Sandilands*, 21 L. J. Q. B. 342. The cases cited by the other side were brought before the Ecclesiastical side of the Court. The Supreme Court Ordinance V. of 1868, s. 23, clearly gives jurisdiction.

Cur. Adv. Vult.

10th January, 1872. *Hackett, ag. C. J.*—This is a suit for restitution of conjugal rights, brought not on the Ecclesiastical, but on the civil side of this Court.

The petition states that the plaintiff and the defendant are both Chinese. That on the 25th of July, 1871, the plaintiff was lawfully married to the defendant according to the rites and ceremonies prescribed by the Chinese law and faith, and that the marriage was duly consummated. That on the 15th of August, the defendant left the plaintiff and went to live apart from her and that he refuses although frequently requested, to return to her. That by the Chinese law the plaintiff is entitled to have conjugal rights rendered to her by the defendant. The petition goes on to pray that the defendant may be compelled to return to the plaintiff and to render her conjugal rights.

The defendant has pleaded in bar denying the jurisdiction of the Court, and it therefore becomes necessary to inquire what the jurisdiction of the Court in matrimonial suits is.

The jurisdiction of this Court is defined by the Supreme Court Ordinance of 1868, which repealed the *Letters Patent* reconstituting the old Court of Judicature. In the 23rd section of that Ordinance we find the following provision: "The Court shall have and exercise the jurisdiction vested under the *Letters Patent* of August 1855, in the Court of Judicature of Prince of Wales' Island, Singapore and Malacca, in matrimonial cases so far as the several religions, manners and customs of the inhabitants of this Colony will admit."

The jurisdiction of the Court, therefore, in matrimonial causes, is precisely the same as that vested in the Court of Judicature by

[a] Not reported.

the *Letters Patent* of 1855. Now the only provision in that Charter which can be construed to confer matrimonial jurisdiction, is that which ordains that the Court "shall have and exercise jurisdiction as an Ecclesiastical Court, so far as the several religions, manners and customs of the inhabitants of the Settlement and places will admit. There is not a word in the Charter about the matrimonial causes *eo nomine*, and the jurisdiction in those cases was merely one of those classes of cases which the Ecclesiastical Court has always dealt with.

The jurisdiction in matrimonial causes therefore given by the Supreme Court Ordinance is simply the jurisdiction which was exercised by the Court of Judicature as an Ecclesiastical Court, and the contention of the defendant is, that this suit having been brought on the Civil side, the Court has no jurisdiction, inasmuch as all suits of a matrimonial nature should properly be brought on the Ecclesiastical side of the Court.

The principle involved in the question thus raised is, of some importance inasmuch as if suitors are declared incompetent to bring suits of a similar description on the Civil side of the Court, a very large proportion of the inhabitants of these Settlements will be deprived of those remedies which the law gives to husbands and wives professing the Christian religion, who sue for redress in the proper Matrimonial Court. The case of *Ardaseer Cursetjee v. Perozeboy*, [10 Moo. P. C. Ca. 375] decided that the Supreme Court of Bombay on its Ecclesiastical side [and it must be remarked that the words of the Bombay Charter of Justice conferring Ecclesiastical jurisdiction are very similar to those of the Penang Charter] had no jurisdiction on its Ecclesiastical side to entertain a suit, by a Parsee wife against a Parsee husband, for restitution of conjugal rights, as there existed such a difference between the duties and obligations of a matrimonial union among Parsees from that of Christians, that the Court if it made a decree had no means of enforcing it, except according to the principles governing the matrimonial law in Doctors Commons, which were in such a case incompatible with the laws and customs of Parsees. The effect of this decision was to exclude all persons except Christians from their right to bring matrimonial suits in the Ecclesiastical Court, and as the only matrimonial jurisdiction expressly given to the Supreme Court is, as I have shewn, that exercised as an Ecclesiastical Court, it becomes necessary to consider whether under the general powers conferred upon it, the Court on its Civil side has power to entertain such a suit. The general powers of the Court are defined in the 23rd section of the Supreme Court Ordinance as follows: "The Court shall have such jurisdiction and authority as the Court of Queen's Bench and the Justices thereof, and also as the Court of Chancery and the Courts of Common Pleas and Exchequer respectively, and the several Judges, Justices and Barons thereof respectively have and may lawfully exercise in England in all Civil and Criminal actions."

The Court then possesses the powers of the Superior Courts in England and cannot exercise any jurisdiction which would not be properly exerciseable by those Courts. In deciding

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whether this suit is properly brought, it is necessary therefore, to refer to the law of England and to those institutions in which our Supreme Court has been modelled, in order to ascertain what are the proper limits of the jurisdiction of the civil and ecclesiastical tribunals respectively, and how far this Court is bound by those limits as established by precedent and authority.

Now it cannot be denied that the present suit is novel, I cannot say that it is *primæ impressionis* as there are some petitions similar to the present on the files of the Court, but this is the first case in which as far as I am aware the question of the jurisdiction of the Court has been formally raised. In England it is perhaps needless to say that no such suit as the present has ever been brought. It is well known that from the earliest times in the history of our law, the Ecclesiastical Court assumed exclusive cognizance of certain matrimonial questions and especially of those in which either a divorce or reuderer of conjugal rights was sought. The jurisdiction of the Spiritual Judges to decide upon the delicate questions arising from the relations between husband and wife was never disputed by the Temporal Judges, and remained untouched by the Parliament. It is alleged as a reason for this, that as marriage was admitted by the religion of the country to be a sacrament, the jurisdiction of the Ecclesiastical tribunals, could not well be disputed. But I think a sufficient reason may be found in the consideration that in these matrimonial matters which were considered to fall peculiarly within the cognizance of the Spiritual Court the ordinary tribunals of the country would have been incompetent to afford a complete remedy. The Common Law Judge indeed might have forcibly compelled the delinquent husband or wife to return to the conjugal abode, but how could he possibly have pretended to enforce the rendering of the *conjugal obsequia* which were sought for by the complainant. The Common Law, therefore, feeling itself powerless to deal with these matters, wisely withdrew, and decided to leave them to be dealt with by the Judges whose peculiar province it was to settle matrimonial disputes. The same authority which had united the spouses together was found to be the most fitting tribunal to appeal to in matrimonial disputes. The Ecclesiastical Court could act upon the guilty or rebellious spouse by monition and in case of need, by excommunication. It could appeal to the conscience which in the delicate relation of husband and wife is the only *forum* where complete reparation can be made. The Common Law Courts might indeed force the reluctant spouse back to his home but once there it must leave him. But the object of the Spiritual Court was to restore peace to the household, and to engage spouses to render to each other that mutual love and affection which they had vowed at the altar.

Gradually, no doubt the proceedings of the Ecclesiastical Courts ceased to be characterized by that paternal solicitude for the welfare of those who sought its aid, which at first rendered them the fittest tribunals for the settlement of matrimonial disputes. In process of time they became in effect mere lay tribunals preceded over by laymen, and the spiritual punishments, which ori-

ginally they were able to invoke in aid of their decrees, ceased to have any terrors for their objects. The term restitution of conjugal rights came to mean nothing more than a return to cohabitation in a dwelling in the same house. But notwithstanding this alteration of their character, the Ecclesiastical Courts continued to preserve the exclusive cognizance of all suits of a matrimonial nature which they had held from the earliest times, and the ordinary tribunals made no attempt to interfere with them in the exercise of this jurisdiction.

How far at Common Law the husband had a right to the custody of his wife seems to have been doubted in some of the earlier cases. See *Rex v. Mary Mead*, 1 Bun. 542, *Rex v. Lister*, 1 Str. 478. But in *ex-parte* Sandilands, 21 L. J. Q. B. 342, the Court of Q. B. refused an application on the part of the husband for a writ of *habeas corpus* to bring up the body of his wife, it appearing upon the affidavit, that she was staying with her son against whom the application was made, by her own consent, and that no coercion or imprisonment had been used towards her. *Lord Campbell, C. J.*, on that occasion said:—"If this writ were to go, and the lady were to be produced in Court, she would be at liberty to follow her inclination, and to return to her son's protection, and we could not make an order upon her to return to her husband. The constitution of this country has wisely pointed out a tribunal where such a subject may be dealt with; and if the applicant shews that his wife has no good cause for living apart from him, there will be a decree in the Ecclesiastical Court that she shall return to him, and reside in his house, bed and board being restored. But here it is clear on the affidavits that the lady is under no restraint. The case of infants is totally different, for there the father has a right to the custody of his child; and if he is deprived of that right, and the child be of tender years, the Court will order the child to be restored to his father; but the Court has no power to restore a wife to her husband, and a writ of *habeas corpus* in this case, if granted, would be wholly nugatory. It is enough, however, to say that the Court has no power to grant the writ."

Assuming, therefore, as I must assume, that this Court has merely the ordinary jurisdiction of the Superior Courts in England, it follows from what I have said that as a general rule, a suit for restitution of conjugal rights does not lie on the Civil side of the Court. The petitioner, however, in the present case rests her claim on the circumstance that being a Chinese she cannot sue in the Ecclesiastical Court, and that her only remedy is on the Civil side of the Court. And it is urged that although suits of this nature have always in England been left to the determination of the Ecclesiastical tribunals, still the powers of the ordinary Courts of the country are sufficiently comprehensive and elastic, to authorize them to interfere whenever a fitting occasion arises to call for their intervention.

Now it appears to me that this argument is founded on purely speculative considerations and that it involves a pure assumption. It is difficult now to say positively, why the Common Law Courts

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refused to interpose their authority to compel the cohabitation of husband and wife, and in many other questions of a matrimonial nature, but it seems to me just as reasonable to suppose that the abstention arose from the feeling that these matters were beyond the proper scope of their powers, and that they could only be properly dealt with by tribunals which could act upon the consciences of suitors, as that it was solely owing to the circumstance of marriage being deemed a sacrament. I do not therefore feel myself justified, from any speculation as to what might possibly have been the policy of the law in fixing the boundaries of the jurisdiction of the various tribunals of the country, or from any opinion I may entertain as to the expansiveness and elasticity of the common law in extending it beyond those limits which precedent and authority have assigned to it.

As Baron Parke observed in *Egerton v. Brownlaw*, 4 H. L. C. 123, "it is the province of the statesmen and not the lawyer, to discuss, and of the Legislature to determine, what is best for the public good and to provide for it by proper enactments. It is the province of the judge to expound the law only: the written from the Statutes; the unwritten or common law from the decision of our predecessors, and of our existing Courts upon the principles clearly to be deduced from them by sound reason and just inference, and not to speculate what in his opinion is best for the community."

It is easy to illustrate the difficulties which might arise from admitting the principle that a judge is authorized, when an injury has been done, for which the law gives no remedy, to enlarge his jurisdiction, to meet the exigencies of the case. I will suppose the case of there being no Court here possessing Admiralty Jurisdiction, a supposition which might at any time be realized. Would it be competent to the Judge on the ground that there was no other tribunal empowered to deal with Admiralty cases, to assume to himself on the plea of necessity, Admiralty jurisdiction? This, I think, could scarcely be contended for. It is clear that every Court is bound to exercise its jurisdiction within the limits imposed upon it by law, and that those limits cannot be exceeded except by the authority of the Legislature.

I am aware that Sir Benson Maxwell considered himself bound by the suggestion which was made by Dr. Lushington, in the case of *Ardaseer Cursetjee v. Perozeboy*, when that learned Judge said: "We should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life amongst them [the Parsees];" and he goes on, "such remedies we conceive that the Supreme Court, on the Civil side, might administer, or at least remedies as nearly approaching to them as circumstances would admit."

But it must be remembered that in using this language, Dr. Lushington is speaking of the Courts of India. Now the Courts of India have special powers conferred upon them with reference to native laws which this Court does not possess. As Doctor Lushington observes: "The Civil Courts of India can bend their administration of justice to the laws of the various suitors who seek

"their aid. They can administer Mahomedan law to Mahomedans, Hindoo law to Hindoos." No such powers have been conferred upon this Court, and the omission from the Penang Charter of the clauses of the Indian Charters, authorizing the judges to decide in certain matters according to Hindoo or Mahomedan law, is remarkable and significant. The maxim *expressio unius, exclusio alterius* seems to me to apply, especially when we consider that both the Indian Charters and our own emanated from the same department of the State. I am, therefore, of opinion that Dr. Lushington's suggestion however just it may be as applied to the Courts of India, is quite inapplicable to a Court constituted like our Supreme Court.

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But it may be said the parties are in the position of foreigners, and the aid of the Court is sought in a matter arising out of the contract of marriage which is *juris gentium*, and they are entitled to relief on the ground of comity. It is true, as Lord Stowell observed of marriage, that there is a *jus gentium* upon this matter, a comity which treats with tenderness, or at least with toleration, the opinion and usages of a distinct people in this transaction. In this Court the marriages of Chinese, Hindoos and Mahomedans have always been recognized, if contracted, in accordance with their respective laws. In questions as to the legitimacy of offspring and for other purposes, these unions ought, no doubt, to be upheld. But a totally different question seems to me to be raised, when the petitioner asks the Court to exercise its jurisdiction to meet the case of an injury which she alleges she has sustained.

The observation of Justice Story, upon a similar question, seems to me, deserving of citation: "It is universally admitted and established," says this learned Judge "that the forms of remedies, the modes of proceeding and the execution of judgments, are to be regulated solely and exclusively by the laws of the place where the action is instituted; or as the civilians uniformly express it, according to the *lex fori*. The reasons for this doctrine are so obvious, that they scarcely require any illustration, each nation is at liberty to adopt such forms and such a course of proceeding as best compats with its convenience and interests, and the interests of its own subjects, for whom its laws are particularly designed. All that any nation can, therefore, be justly required to do, is to open its own tribunals to foreigners, in the same manner and to the same extent, as they are open to its own subjects, and to give them the same redress as to rights and wrongs which it deems fit to acknowledge in its own Municipal Code for natives and residents." [*Story Conf. of Laws*, s.s. 556, 557.]

On the whole, I am opinion that the suit for restitution of conjugal rights is, by the law of the Colony, and by the constitution of the Supreme Court, a remedy peculiar to the Ecclesiastical side of the Court, and that the Judge, on the Civil side, has no jurisdiction in such a suit.

Plea allowed. Suit dismissed. [a]

[a] Vide *Shaik Madar v. Jaharrah*, March, 6, 1875.—*infra*. p. 385.

The Court has no jurisdiction on Habeas Corpus to order a woman to return to her husband 22 (4 C) 38 November

SHAIK EBRAHIM BIN ALLEE v. COHEN.

PENANG. A promissory note [in Malay characters] payable to a person, or the agent of such person, is to be taken as payable to such person or bearer, and is negotiable and can be pleaded as a set off.

HACKETT, J.
1871.

March 22.

This was an action on the common *indebitatus* counts. The defendant pleaded three pleas. *1st*, never indebted. *2nd*, accord and satisfaction. *3rd.*, set off. At the trial, it appeared that the set off was on a promissory note in the Malayan language, made by the plaintiff to one Tuan Shaik Awady Ambarrah Beernadahee, who endorsed the same to the defendant. The note was not payable to "order" or to "bearer," but simply to "Tuan Shaik Awady" or the agent of the said Tuan Shaik Awady."

C. W. Rodyk, on behalf of the plaintiff, admitted the note to have been made as stated, but contended that it was not negotiable, as it was not payable to "order" or "bearer." *Byles on Bills of Exchange*, 62, 113 & 114, and if not negotiable, the defendant could not maintain an action on it against the plaintiff, and if he could not maintain such an action, he could not set it off against the plaintiff's claim.

R. C. Woods, junr., for the defendant, contended that the words "or the agent of the said Tuan Shaik Awady" was equivalent to "bearer," and if payable to bearer, it was negotiable, and the defendant could maintain an action on it against the plaintiff, and consequently set it off against the plaintiff's claim.

Hackett, J. I think, as the parties were natives and could not express themselves, though they intended the note to be negotiable, that the words "or the agent of the said Tuan Shaik Awady" must be taken to be equivalent at least to "bearer," and the note on the whole negotiable.

Rodyk on this, asked for a non-suit which was accordingly entered.

Plaintiff non-suited. [a]

MAHOMED JOONOS v. SAIBOO.

PENANG. Judgment in an action of trespass, where the title to the freehold, has been put in issue, and decided on, is an estoppel to a subsequent action of ejectment for the same land, provided there has been a trial and verdict in such first action; but where the judgment in such action of trespass is only by consent, this operates no more than a judgment by default, and is no estoppel.

HACKETT, J.
1871.

June 13.

The Statute 8 & 9 Vict., c. 106, does not apply to this Colony.

Twelve years uninterrupted possession is, by the Limitation Act XIV. of 1859, sufficient to maintain an ejectment. The above named Limitation Act is retrospective.

This was an action in ejectment. The *locus in quo* had been conveyed originally to three persons and their heirs, without any further words to shew how they took, whether as tenants in common or not. Two of the three, made an agreement with the plaintiff to sell their shares to him. The defendant claimed through the last survivor of the three persons first mentioned.

[a] See also Broom's Commentaries, p. 443, and *Yates v. Sherrington*, 11 M. & W. 42; s. c, in error 12 M. & W. 855.

The plaintiff having brought this action, the defendant *inter alia* pleaded a plea of a judgment recovered by him against the present plaintiff, in an action of trespass, concerning the very same land in dispute now, and prayed judgment if the plaintiff could maintain this action.

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1871.

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The plaintiff joined issue.

R. C. Woods, jr., for the plaintiff. We admit the judgment mentioned in the plea, but submit that the plaintiff is not estopped thereby, as the judgment there, was in an action of trespass, whereas the present one is in ejectment, and judgment in an action of trespass cannot possibly be an estoppel to an action of ejectment even though the same land be in dispute in both actions.

C. W. Rodyk [Ross with him], for defendant. I submit that the judgment in the former action which was by consent, is a complete bar to this action. *Doe v. Wellsman*, 18 L. J. Ex. [N. S.] 277. The judgment in that case was delivered by C. B. Pollock, he there says: "on the argument this point was amongst others, fully argued. We think it unnecessary to give an opinion on any of the other objections, being satisfied that this ought to prevail. Assuming that there was an estoppel, and that it could be replied to such a plea [as to which we say nothing], it was an estoppel, only to the possessory title of John Doe, &c."

[Hackett, J. That is under a query. The Court there does not say that it is an estoppel, but "assuming that there was an estoppel."]

That case was decided as the estoppel only, applied to part of the time and was consequently bad, the inference therefore from it, would be that if the estoppel extended to the whole time, it would be a complete bar.

[Hackett, J. Not at all.]

The case of *Wittaker v. Jackson*, L. J. Ex. [N. S.] 181, also shews that the judgment is a complete bar; and the case of *Kitchen v. Campbell*, 3 Wils. 304, is to the same effect, but it was a case relating to personal property.

Woods in reply. The cases cited are inapplicable. It is clear the judgment is no bar.

June 17. Ross, for the defendant. The question here is whether the plaintiff is estopped by the former judgment in an action of trespass, the land in both cases, being the very same. In the notes to the *Duchess of Kingston's case*, [2. Sm. L. C. 702], it is stated: "one of the chief authorities as to the effects of a previous verdict in an action *inter partes* is *Outram v. Morewood*, 3 East, 346, in which the principles and authorities on which this part of the law of estoppel depends, are stated with great force, learning and clearness by the L. C. J." It then sets out the pleadings, and goes on: "the question," said Ellenborough, C. J., "is whether the defendants, the husband and wife, are estopped by this verdict and judgment from averring, contrary to the title there found against the wife, that the coal mines now in question are parcel of the coal mines bargained and sold by the indenture abovementioned. The operation and effect of this finding, if it operates at all as a conclusive bar, must be by way of estoppel,"

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and further on he says: "the question then is, is the wife herself estopped by this former finding to aver to the contrary." In Brook, tit. Estoppels, p. 15 [citing 33 H. C. 6, 7, 19, 50; and see also Bro. Estate, 158, 2 E. 4, 17.], it is said to be "agreed" that all the records in which the freehold comes in debate shall "be estopped with the land, and run with the land, so that a man may plead this as party, or as heir, as privy, or by *que* estate. But it is said, that by the 'freehold coming in debate,' must be meant a question respecting the same, in a suit in which the freehold is immediately recoverable as in an assize or writ of entry. I answer that a recovery in any one suit upon issue joined upon matter of title, is equally conclusive upon the subject matter of such title, and that a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed "right of possession." This case I submit, is exactly like the present one.

[*Hackett, J.* Was the title in question in the former suit? [former pleadings read]. The boundaries mentioned, in both declarations are exactly the same and the pleas put the title in issue].

It is true trespass does not depend on title, but on possession, but in the former suit, the title was directly put in issue. In Sm. L. C., p. 704, it is stated: "see further *Eastmure v. Lawes*, 5 Bing. N. C. 450, from which case it appears, as was indeed always clear on principle, that a verdict negating the right of a defendant stated in his plea, estops him in a subsequent action from asserting that right as plaintiff against the same party." That is exactly our case, the marginal note of the case is, "When a verdict is found against a defendant on a plea of set off, he is estopped from suing the plaintiff for the demand specified in the plea of set off." Tindal, C. J. there says: "the question is whether, after a precise issue has been found against the plaintiff, he may bring an action and agitate the whole matter over again. Consistently with the decision in *Outram v. Morewood*, I cannot see how an estoppel can be set aside on the grounds set forth in this replication." There are several other cases, but I think, it is quite unnecessary to cite them.

[*Hackett, J.* I will call on Mr. Woods now.]

Woods. There has not been one direct authority cited. All the cases cited in which the rule as to estoppels applied, were either judgment in an action of trespass against another action of trespass, or judgment in ejectment against a subsequent action of ejectment, but there is not a single decision in favour of the defendant's contention. In the case of *Doe v. Wellman*, 18 L. J. Ex. 277, the first case cited, the Judges there say that they will not decide the question. If Smith and Brooke are so clear, why were they not taken notice of in this case, especially on a demurrer? Pollock, C. B. there says: "assuming that there was an estoppel," in this case all went on supposition. It was an action for mesne profits, and such an action is usually brought after

ejection. As there are no cases in point, it is but fair to presume in our favour.

[*Hackett, J.* I see a case of *Doe v. Wright*, 10 Ad. & E. 763, which shows this is an estoppel.]

That case is not applicable. There is a great difference between trespass and ejection. The first depends on the possessory right for damages simply, but the second on title, it is a mixed action, and is not brought for damages, but for recovery of the land itself.

[*Hackett, J.* The pleas in the former action, put the title in issue.]

The cases cited by the other side are not in point, both actions were for trespass, and I admit that in such a case there is an estoppel. The plea of *liberum tenementum* is not a bar, I might be lessee only and yet maintain an action of trespass. If there be an estoppel in this case, then of course, it must be *vice versa*, and if a man loses an action in ejection, he cannot subsequently bring one of trespass. The case of *Wittaker v. Jackson*, 33 L. J. Ex. 181, certainly at first sight appears conclusive, but on examination, it will be found to be really not in point. If it is any authority at all, it is against the defendant. Both actions there were for trespass, and yet the whole Court did not agree to the estoppel, for Martin B. dissented. I have looked over all the books on trespass and ejection, and can find no authority for the defendant's contention. What is stated in Smith's L. C. is nothing more than the general deduction from the authorities admitted. The case in Bingham's Report is one of contract and is not applicable. You need not plead a set-off, but if you do, and then lose it, of course it is a bar, both the set-off and second action being for the same money debt. The Court ought to decide in plaintiff's favour as there is no decision against him.

[*Hackett, J.* Do you mean to say the title was not in issue in the former action.] -

Incidentally only.

[*Hackett, J.* No, it was directly put in issue by the pleas.]

A recent case in the authorized Law Reports, shews us how careful we must be in matters of title; it was an extraordinary case, a landlord lost as against his tenant an action in ejection.

[*Hackett, J.* My impression is, that the former consent to judgment was merely formal; but what is the effect of the record? If he consented to judgment on plea of "not guilty," it would be no bar; but here there was a plea of title in issue and judgment for plaintiff on all the pleas: this is altogether different.]

There is no direct authority for holding this as an estoppel.

[*Hackett, J.* I go on the general principle. He consents to judgment on all pleas thereby denying that he has any claim to the land.]

That only refers to the produce of the land, but not to the land itself.

[*Hackett, J.* The third plea was to the land, and issue was joined on all the pleas.]

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The consent is insufficient, no evidence was gone into.

[*Hackett, J.* His confession is sufficient, as when judgment is signed by default [a]. I am certain the consent was not intended to act as an estoppel, but the records cannot be got over. The defendant in his plea claims the freehold and afterwards comes into Court, and gives up his claim to the land. We are bound by the legal effect of such judgment. Lord Ellenborough in the case cited by Mr. Ross, says "that a recovery in any one suit upon "issue joined upon matter of title, is equally conclusive upon the "subject matter of such title, and that a finding upon title in "trespass, not only operates as a bar to the future recovery of "damages for a trespass founded on the same injury, but also "operates by way of estoppel to any action for an injury to the "same supposed right of possession." The matter in question, and substance in both actions being the title to the land, the form of action does not matter. On the whole, I think the judgment in the former action is a bar to this action.]

Woods upon this, asked to be allowed to go on with the facts of the case, as the judgment on the estoppel would be a very great hardship on his client, and also asked to have the question reargued. This having been allowed, and evidence adduced, the question was now reargued.

Ross, for the defendant. There are three points in this case—1st, whether the original conveyance to the three persons and their heirs, was a joint tenancy. This I believe, is admitted by the other side,—2nd, whether the agreement by two of the three to sell their shares to plaintiff, severed the tenancy; and 3rdly, whether the plaintiff has been in possession of the land for the last twenty years. As to the 2nd point, I submit the joint tenancy was not severed by the agreement relied on. The Statute of Frauds requires a writing for anything concerning land, and the subsequent Act VIII. and IX. Vic., c. 106, requires all transactions required by the Statute of Frauds to be in writing, to be by deed. This Act it is submitted, extends to the Straits. The agreement relied on is an agreement to sell, not an absolute sale, and is therefore bad.

[*Hackett, J.*—It is a good severance in equity.]

Yes, the plaintiff can in equity call on the parties to perform their agreement, but it is bad in law, *Musgrave v. Dashwood*, 2 Vern. 63. Actual alienation is necessary to sever the tenancy, 1 Step. Com. 349; Wms. Real. P. [9th ed.] 132; *Partridge v. Powlet*, 2 Atk. 54; *Brown v. Raindal*, 3 Vesey 258. If this agreement is of no avail, then we have a claim according to the laws of joint tenancy to the whole land. As to the third point, I submit there is no evidence to shew that plaintiff has had possession of the land for the last twenty years.

Woods.—The twenty years possession by the plaintiff of this land, has been clearly proved. The agreement is good and has completely severed the joint tenancy. It is not necessary that it should be a deed, as the Statute of Frauds simply requires a

[a] Williams' P. P., pp. 92, 93—see also the judgment herein.

writing, and the Act 8 & 9 Vict., c. 106, I submit, does not extend here. HACKETT, J.
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June 24th. The question of estoppel was now further argued. MAHOMED
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Woods.—A judgment recovered is not pleadable in ejectment [a].

[*Hackett, J.*—Why not? Under the old law you could do so, but not under the modern procedure.]

The modern procedure is under the Common Law Procedure Act, Act, 15 & 16 vict., c. 76, s. 207, but this Act does not extend here. Teher is no estoppel in this case, the pleadings in the two actions are quite different, and by the declaration in the first action, the time is limited.

[*Hackett, J.*—You put the whole freehold in issue in that action.]

Yes, but that was only as to the time mentioned in the declaration. I ought to have demurred to this replication, and if decided against me, to plead *nul tiel* record. The case of *Outram v. Morewood*, cited by the other side, was an action of trespass, which was estopped by a prior action of trespass. There is not the least doubt as to this. According to the old law, any number of actions of ejectment might be brought for the same land, as there might have been a demise subsequently to the first action, *Adams on Ejectment*, 286; this old authority is followed by Roscoe and Cole, which is the latest work on the subject. If a person is a free holder, he is not so by the judgment of the court, but because he happens to be so. *Cole on Ejectment*, 77. I submit this is no estoppel, the declaration in the former action, limited the time, and is no bar when the question of possession is raised. I can only find one case in favour of the defendant, and that is, an anonymous one reported in 3 Leon. 194, of the time of Elizabeth, and the reporter might be wrong. I can no where find that Leonard was considered an authority or that he was a Sergeant. The case is not on all fours, and is not noticed in Harrison or Fisher, but is simply cited in the case of *Doe v. Wright*, 10 Ad. & E. 768 [b].

[*Hackett, J.*—That case is just the converse of this.]

Yes, and it has never been since reported or followed. In Saunders, it is stated, in a second action of ejectment, one might give evidence of a former action of ejectment. The case in Bingham is not only one on contract, but has according to *Fisher's Digest*, title “ judgment recovered,” been since over ruled by the case of *Brokenshire v. Morgan*, 9 M. & W. 111. It was said that even if judgment in former action had been by default, still it was a bar; this I submit, is not so, *Howlett v. Tarte*, 31 L. J. C. P. 146, Williams, J. there says, there is no authority for saying that judgment by default is a bar to a subsequent action, and

[a] This is because there is no pleading in ejectment, which does not apply here. See Broom's Max., p. 36.

[b] Also in *Outram v. Morewood*, *suprà*.

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Byles, J. says, "it is sufficient to say there is no authority on this point." In *Mayne on Judgments*, it is stated that if judgment is obtained by mistake, equity will set it aside. This Court is both a Court of Common Law and Equity, and not separate,—*Hormajee v. Droye*, Morton's Ind. Rep. 197; *Rex v. Wollee*, Ibid. 221; and these cases are supported by *Graven v. Hadden*, 3 L. R. P. C. 707, [1st Dec.] as to Ceylon. In England there are two Courts, but here it is not necessary that this should be so. The question I submit, in this case, is one of evidence, and not one of judgment recovered.

Ross. There is no precedent to guide us in this case, but it must be argued by analogy. If in trespass, the plaintiff had been plaintiff, and lost his case, there is no doubt that would be an estoppel. *Wittaker v. Jackson*, 33 L. J. Ex. 181, Pollock, C. B. there says, "This rule was obtained on the ground that the Judge, at the trial improperly rejected evidence to contradict an estoppel. It appears to me that the record if it could have been pleaded, was clearly an estoppel; but as it could not be pleaded, it was conclusive in evidence. What the defendant wanted to do, was to try the question over again." This I submit is just the case here. The plaintiff simply wants "to try the question over again." There is no doubt that both actions relate to the same land. The defendant in the first action pleaded a plea of "*liberum tenementum*," and then abandoned it. In the case of *Buckland v. Johnstone*, 23 L. J. C. P. 105, an action of trover was held to be a bar to an action for money had and received. In the case of *Graven v. Hadden* cited by the other side, the Court went on the practice. Here I submit there are separate Courts, and in a Court of Law, equitable questions cannot be tried.

Woods in reply. All the cases cited were actions of trespass against subsequent actions of the same kind. The time was limited in the first action, whereas it is no such thing here. There was also no evidence at the trial of the former action of trespass.

Cur. Adv. Vult.

September 19. *Hackett, J.*—This is an action in the nature of an ejectment brought to recover the possession of a piece of land situate at Tanjong Tokong in Penang, described in the petition as abutting on the east on the sea, on the west on Mr. Tesserand's ground and a small road, on the north on Mr. Tesserand's ground and a Chinese burial ground, on the south on land formerly of Mr. Brown and now of Hoh Leng, which the defendant is charged with knowingly retaining wrongful possession of.

The defendant has pleaded; first, the general issue; secondly, that the lease is not the plaintiff's; thirdly, *liberum tenementum*, or a freehold in the defendant; and fourthly, a plea by way of estoppel which is as follows:—

"And for a fourth plea, the defendant says that the plaintiff ought not to be admitted to say that he is entitled to the possession of the land in his declaration mentioned or to maintain this action because he says that before this suit, he, the defendant, brought an action against the now plaintiff in the Penang Division of the Supreme Court for the same cause of action

"as in the declaration mentioned, and such proceedings were thereupon had HACKETT, J.
 "in that action; that afterwards and before this suit, it was considered by the 1871.
 "judgment of the said Court that the now defendant was entitled to the
 "possession of the said land, and should recover possession of the said land,
 "and afterwards and before this suit by virtue of the said judgment, the
 "defendant entered in possession of the same, and the said judgment still
 "remains in force, and this the defendant is ready to verify. Wherefore he
 "prays judgment, &c."

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Upon all these pleas the plaintiff has taken issue.

The defendant put in evidence the record of the case upon which he relies in support of the plea of estoppel. From this record it appears that the defendant on the 22nd of March, 1871, brought an action of trespass against the present plaintiff in which he alleged, "that he on or about the 17th day of December, then last past and divers other days and times between that day and the commencement of the action, with force and arms broke and entered certain land belonging to the then plaintiff situate at Tulloh Ayer Rajah in the island of Penang bounded on the east by the sea 255 feet; west by Mr. Tesserand's ground and a small road 475 feet, north by Mr. Tesserand's and the Chinese burial ground in a crooked direction 1,398 feet, and on the south by Mr. Brown's ground 1,275 feet." The declaration then went on to charge the present plaintiff with pulling and carrying away betel nuts, cocoanuts and other fruits then growing on the said land and with other acts of waste, for which the present defendant claimed \$100 damages. The defendant in the suit, [the present plaintiff], pleaded first, not guilty; secondly, that the land was not the property of the plaintiff; thirdly, a free hold in the defendant; and fourthly, that the fruit, &c., were not the property of the plaintiff. Issue was taken on these pleas, and the cause came on for trial, on the 23rd June, 1871, when the defendant confessed the action, and judgment was entered by consent of both parties for \$15 damages.

The present defendant contends that this confession of the previous action, is an estoppel and bar to the plaintiff in the present suit, and the decision on this point depends upon the question whether the same cause of action was at issue in the previous action as that which is now sued for.

The principles which govern the effect of a previous verdict in an action between the same parties are clearly stated by Lord Ellenborough, C. J., in *Outram v. Morewood*, 3 East 346, which was an action of trespass for breaking and entering a certain close and digging coal there. The plea alleged a conveyance of the *locus in quo* to the persons through whom the defendant claimed, and further that the coal mentioned in the declaration was part of the coal so bargained and sold. The plaintiff replied by stating that the plaintiff had sued the defendant in trespass for breaking and entering the same identical coal mine. The defendant pleaded title, and averred that the coal in the declaration in that action was part of the coal bargained and sold as aforesaid. That the plaintiff traversed the last mentioned averment; that issue was joined in the traverse, and the issue found for the plaintiff, and that judgment thereupon followed, and the plaintiff prayed judgment, &c., &c.

HACKETT, J. Demurrer and Joinder. The replication was held good. The law of estoppel is thus stated in the judgment of Lord Ellenborough (p. 354) "a recovery in any one suit, upon issue joined in matter of title is equally conclusive upon the subject matter of such title"; and "a finding upon title in trespass not only operates as a bar to the future recovery of damages for trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession." His Lordship cited a case from Leonard [*Anon* 3 Leon. 194], where the defendant in an action of trespass *quare clausum fregit*, pleaded a former recovery in an *ejectione firme* brought by himself against the plaintiff for the same land, and the plea was held to be an estoppel, for that the possession was bound by the recovery.

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Mr. Woods for the plaintiff has contended, that the doctrine laid down in *Outram v. Morewood* [*a*] does not apply, because this is an action of ejectment, and as he maintained a verdict *inter partes* is no bar to a fresh ejectment, and that any number of other ejectments may be brought by the same party for the same premises. This may be so, and that peculiarity in ejectment arose from the facility of varying the title of the plaintiff by alleging a different demise or a demise on a different day, so that the title might always be made to appear different. But if the second declaration exactly resembled the first it is difficult to see why upon recognized principles, a previous judgment should not be pleadable. In *Doe v. Wright*, 10 Ad. & E. 763, it was held that a defendant was estopped by a judgment against him in ejectment, from pleading *liberum tenementum* in an action brought against him for the *mesne* profits. And in the case in Leonard a plea by a defendant in trespass of a former recovery by him in ejectment brought for the same piece of land, was held to be an estoppel, for that the possession was bound by the recovery. The question in the present case does not seem to me to resemble either that in *Doe v. Wright* or in the case from Leonard. In the present case, it appears that the now defendant brought an action against the present plaintiff for breaking and entering the *locus in quo*. The defendant in that case pleaded amongst other pleas, a freehold in the premises, upon which issue was joined. If indeed there had been a verdict upon that issue, I think the plaintiff would have been estopped from bringing his present action. But that was not the case; on the day of trial the defendant agreed to confess judgment, and by consent judgment was entered for \$15 with a stay of execution. Now it seems to me impossible to contend that this judgment by confession can have the same effect as judgment after verdict upon an issue between the parties in which the title to the land was in question. This judgment by confession is in effect, nothing more than a judgment by default, that is to say the defendant withdraws his pleas and admits the plaintiff's cause of action as set forth in his declaration. Now what is the cause of action stated in the declaration, it is the breaking and

[*a*] 3 East. 365.

entering the land of the plaintiff, and carrying away certain fruits. We must therefore take it as conceded, that the defendant in the former suit admitted the land to be the land of the plaintiff, but only so far as was necessary to support the action of trespass. And as the mere possession of the land gives a right to maintain trespass, I do not think the present plaintiff is to be taken as having, by his confession, admitted any thing more than the bare naked possession of the then plaintiff. And I therefore think he is not estopped by the former judgment from bringing the present action. The case of *Howlett v. Tarte*, 31 L. J. C. P. 146, shews that a defendant, by allowing judgment to go against him by default in an action to which he has a good defence, is not estopped from pleading such defence in a subsequent action against him by the same plaintiff, if such defence be not inconsistent with any traversable averment in the declaration in the former action. Applying that principle to the present case, I do not think the claim to the right of possession set up by the present plaintiff is inconsistent with the allegation of a *de facto* possession in the declaration of the petition in the former suit. I therefore think that on the issue raised by the fourth plea there must be judgment for the plaintiff.

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I have now to consider the issue raised by the three first pleas which put in issue the plaintiff's title. It appears from the documentary evidence put in, that the land now in dispute was conveyed to three persons named Panjang Emeh, Allang Gandel, and Lebby Draway, as joint tenants in fee, by a deed, dated the 26th day of November, 1844. Panjang Emeh survived the other joint tenants, and assuming that there was no severance, would have become entitled to the whole land by right of survivorship. Panjang Emeh died about the year 1852, and his widow Fatimah administered. In the year 1869, a petition was filed on the equity side of the Court by Essah, the widow and administratrix of Abdul Rahnee, one of the sons of Panjang Emeh, against Fatimah as the administratrix of Panjang Emeh, for the administration of the estate of Panjang Emeh. The defendant put in her answer but instead of the accounts being taken in the usual way, I find that the matter was submitted to arbitration, for what reason I am unable to say, as I should have thought that the accounts could have been taken much more cheaply and efficiently by the Officer of the Court. And the arbitrator having made his award, the award was on the 12th May, 1870 made a rule of Court, A writ of *fi. fa.* then issued out of the Court in pursuance thereof, and the Sheriff in accordance with the writ, caused the land now in dispute to be put up to auction on the 23rd of October, 1870. At the sale, the person through whom the defendant claims was declared to be the purchaser, and the land was subsequently, on the 13th December, 1871 conveyed to the defendant. The defendant's title therefore is claimed through Fatimah the administratrix of Panjang Emeh, and if it is true that Panjang Emeh, as the survivor, became entitled to the shares of the joint-tenants, then the title of the defendant would *prima facie* appear to be good. The plaintiff, however, asserts that there was really a severance of

HACKETT, J. the joint-tenancy, and he contends that the other joint-tenants, Allang Gandel and Lebby Drawey sold their respective shares to him, and effectually, although apparently informally, conveyed the same to him, so that there was an actual alienation on their part. The plaintiff's evidence upon this head is that twenty four or twenty five years ago he purchased Allang Gandel's shares from him for \$50 and that on the occasion of the purchase, a Malay paper containing the contract was drawn up by Lebby Drawey and signed by Allang Gandel. A Malay paper has been put in evidence which purports to be this contract, the translation of which is as follows :

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" In the year 1263, on Thursday, the seventh day of the month of Rabiul-hakir (25th March, 1847). Be it known that a Malay man of the name of Allang Gandel came and directed me to have a paper made and given into the hands of Mahomed Joonoos. I, Allang Gandel, do hereby sell a piece of compound land in the district of Tanjong Tokong held in partnership by three persons, Panjang Emeh, Lebby Drawey and me the said Allang Gandel, the grant thereof is numbered 2321, and it is my share that I have sold unto Mahomed Joonoos for the sum of fifty dollars I have received from the hands of Mahomed Joonoos, and the agreement between me, Allang Gandel and Mahomed Joonoos is, that when I, Allang Gandel, return from Pulo Lancawai, I will make out a grant and give the same unto Mahomed Joonoos without question, or answers in future days. Written in the presence of the undersigned witnesses."

" This is the mark of the hand of me, Allang Gandel, a true Token."

" Attested by Lebby Drawey, attested by witness Pahlang Bawah."

The plaintiff further states that about a year subsequent to this, he purchased Lebby Drawey's share for \$40 and that a paper similar to the preceding was drawn up and signed by him, and that ever since that time he [the plaintiff] has been in possession of the shares in the land thus purchased by him.

The plaintiff contends that the land was effectually conveyed to him by these documents. But although the Act 8 & 9 Vict., c. 106, is not in force here, yet it appears to me to be impossible to regard this document as a valid conveyance. It is certainly not a grant, not being under seal, and it cannot, I think, be regarded as a feoffment for two reasons, first, because it does not contain words implying an actual conveyance, and secondly, because the essence of a feoffment is the solemn and formal livery of seizin of which the writing was, by the common law merely the evidence, [although by the Statute of Frauds a writing became necessary for the transfer of any greater interest in land than an estate at will,] and there is no evidence in this case of a formal livery of seizin. But the plaintiff further contends that he has, at all events, acquired a good title by length of possession. It is clear that by Stat. 21, Jac. I. an uninterrupted possession for twenty years, not only gave a right of possession which could not be divested by entry, but also gave a right of entry. So that if a person who had such possession was turned out of it, he might lawfully enter and bring an ejectment for its recovery; upon which he would be entitled to judgment. The period of limitation which I have mentioned is that which, in accordance with English law, was in force here prior to the Indian Act XIV. of 1859. By that Act, however, it was enacted that " no suit

"shall be maintained in any Court of Judicature within any part of British India, unless the same is instituted within the period of limitation thereafter made applicable to a suit of that nature, and the periods of limitation and the suits to which the same respectively shall be applicable, shall be the following, that is to say . . . 12. To suits for the recovery of immoveable property to which no other provision of this Act applies, the period of twelve years from the time the cause of action arose." This Act therefore, as to all actions subsequent to the act, swept away the English law which previously existed, and for a period of twenty years, in suits for the recovery of land, substituted a period of twelve years: since that Act therefore twelve years of uninterrupted possession forms a positive prescription, and the impression which seems to have prevailed at the bar during the argument, that the Act of 1859 did not apply in this case, seems to me to be erroneous. Its retrospective effect is clear from the 18th section, by which "all suits to which the provisions of the Act are applicable that shall be instituted after the period of two years from the date of the passing of the Act, are to be governed by the Act and no other law of limitation." According to the evidence of the plaintiff he farmed the land himself after the purchase from the two joint tenants, and then let it out to Sitamby. Mahomed Ibrahim, however, differs somewhat in the account he gives. He says that after the purchase from Allang Gandel and Lebby Drawey, Mahomed Joonoos used to manage the land, and that Panjang Emeh [the other purchaser] used also to rent out the land. But he states that his brother Sitamby farmed the land from the commencement. He also said that he rented the land from Joonoos about 8 years ago for a period of 5 years. Sitamby, it appears, died 8 years ago, and at that time \$14 were due by him for rent, which sum, Ibrahim states, he paid to Joonoos. On cross-examination this witness stated that Sitamby first rented the land for 10 years from the three joint-tenants, and afterwards from Mahomed Joonoos and his father. The date of the death of Panjang Emeh is not fixed positively but it seems to have occurred about the year 1852. Mat Akib states that he has seen the plaintiff exercising authority over the land in dispute for the last 10 or 11 years. The evidence of the plaintiff's witnesses has not been contradicted, in any material part, by the witnesses for the defendant, and I think that the plaintiff has succeeded in shewing that he was in possession of the shares in the land purchased by him from the joint tenants for more than twelve years prior to the entry of the defendant. I therefore think that there must be judgment for the plaintiff for two-thirds of the land described in the deed of the 26th of November, 1844.

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Judgment for plaintiff.

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 —
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June 21.
 —

An action for trespass and false imprisonment, the defendant pleaded a former acquittal for the same causes of action by the Police Magistrate.

Held, on demurrer, that the plea was bad, as the Statute 9. Geo. IV., c. 31, does not extend to this Colony.

A Constable who arrests and imprisons a person who enters into a police station in an intoxicated state, and creates a disturbance therein, is justified in so doing, although he acted without a warrant, by the 86th section of Act XIII. of 1856 and 22nd section of Act XLVIII of 1860.

The plaintiff having recovered judgment on the first count, and the defendant on the second count, the Court, by virtue of sections 102 of Act XIII. of 1856 and 29 of Act XLVIII of 1860, allowed the defendant his full costs against the plaintiff, but refused to allow the plaintiff any costs.

The plaintiff having demurred to the plea of the defendant [a police officer], and the demurrer being allowed, he was allowed his full costs of such demurrer against the defendant.

This was an action to recover damages for an assault and battery, and also for an assault, battery, and false imprisonment.

The declaration was as follows:—

"The plaintiff by Isaac Bond, his Advocate and Attorney, sues the defendant, for that the defendant on the 11th day of February 1871, [maliciously and without any reasonable or probable cause] [a] assaulted and beat the plaintiff.

"And the plaintiff also sues the defendant, for that the defendant on the day abovenamed [maliciously and without any reasonable or probable cause] [a] assaulted and beat the plaintiff, took him into custody, and caused him to be imprisoned in a police office.

"And the plaintiff claims, &c., &c."

The defendant to this pleaded "not guilty" by Act XLVIII. of 1860, section 22, and Act XIII. of 1856, section 86; and a second plea, which was in the following words:—

"And for a second plea as to the alleged trespass in the said declaration mentioned, the defendant says that after the commission of such trespass, to wit, on the 27th day of February last past, upon the complaint of the plaintiff, before then made by him of the said trespass, the defendant was brought before Duncan Clerk Presgrave, Esq., then being a Justice of the Peace for the Colony of the Straits Settlements, and Magistrate of Police in and for Prince of Wales' Island; and therefore the said D. C. Presgrave, Esq., being such Justice of the Peace and Magistrate of Police as aforesaid, did then dismiss the said complaint, upon the hearing thereof, on the ground that the said offence was not proved, whereby the defendant then became, and still is, released from the said action, and this the defendant is ready to verify."

The plaintiff joined issue on the first plea and demurred to the second, the marginal note of the demurrer being as follows: "A matter of law intended to be argued is, that the dismissal of the complaint referred to in the defendant's plea in the Police Magistrate's Court, is no bar to a civil action for assault and false imprisonment." The defendant joined in demurrer.

Bond, in support of the demurrer, contended that a dismissal by a Magistrate was no bar to an action for the same cause of action in the Supreme Court; and although in England there was an enactment, the Statute 9, Geo. IV., c. 31, requiring a certificate of such dismissal, and made that certificate a bar, yet that Act could not support this plea, as it did not extend here. [*Maxwell on Magistrates*, p. 25].

[a] These words were subsequently added in accordance with Section 29, Act XLVIII. of 1860.

C. W. Rodyk, in support of the plea, contended that the Act did extend here and cited 9, Geo. IV., c. 74, s.s. 46 & 125, and the cases of *Bradshaw v. Vaughan*, 30 L. J. C. P. [N. S.] 93 s.c. 9. *Com. Ben.* [N. S.] 103; *Reg. v. Elrington*, 31 L. J. M. C. [N. S.] 14; s.c. 1 *Best & S.* 688; and *Bullen and Leake's Precedents in Pl.* [2nd ed.], p. 672 [a].

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Bond in reply contended that the Act 9, Geo. IV., c. 74, did in no way extend the Act 9, Geo. IV., c. 31, to the East Indies.

Hackett, J., held that the Act 9, Geo. IV., c. 31, did not extend to the East Indies, and consequently allowed the demurrer with costs.

The case then went to trial on the merits, when the plaintiff had judgment on the first count with *one cent* damages and the defendant had judgment on the second count [b].

Rodyk on this asked the Court to allow costs to his client, but not the plaintiff.

Bond having objected,

Rodyk cited sections 112 of Act XIII. of 1856 and 29 of Act XLVIII. of 1860.

The Court thereupon gave the defendant his costs against the plaintiff.

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The law of England was introduced into this Settlement immediately on possession thereof being taken in the name of the King of England by and for the use of the late East India Company: all laws [if any] previously existing, thereupon immediately ceased. The circumstance that possession was taken by an Officer of the East India Company does not prevent the transfer of the sovereignty and dominion of the Island to the Crown of England, especially as the rights of the Crown over all the territories of the Company are preserved by the Act 53, Geo. III., cap. 155, sec. 93.

The fact, that when possession was taken of this Settlement there were a few wandering fishermen on the Island, does not affect the general rule of law in such cases, inasmuch as they could not be regarded as the inhabitants of a settled country with laws of their own, and who are entitled to the benefit of them, until changed by competent authority.

The law of England was certainly imported into this Settlement by the Charter of 1807, if not earlier.

The competency of witnesses, is to be determined by the law of the forum; so that though, by Mahomedan law, concubines are incompetent witnesses to prove a divorce, still that is no reason why their evidence should not be received in a Court of Justice in this Settlement, where, by English law, they are competent.

A testator directed that any legatees or devisees "proceeding to law in any Court or Courts for their said shares" should lose their legacies.

Held, the direction was void, as property is inseparable from the right to institute legal proceedings and the protection of the law, and it was repugnant and inconsistent with the gift.

The testator gave certain personal property [naming them] to certain legatees. In an afterpart of his Will he gave the whole of his personal property to his executors upon certain trusts, without excepting the property so first bequeathed away.

[a]. See also in Criminal Cases, Ordinance 5 of 1870, s. 27. If the defendant had been convicted even, it would be no bar. See *Broom's Legal Maxims* [3rd Ed.], p. 313. As to the construction of s. 46 of 9 Geo. IV., c. 74, see *Reg. v. Khoo Ghee Boon*. Criminal Rulings, Vol. II of these reports.

[b] As to the justification of the arrest and imprisonment, see 3 Car. & P. 21—25; 4 Car. & P. 308; 2. M. & W. 477; 8. Moore, 362; 4. N. & M. 469; 11. Q. B. 311—24; 2. Camp. 358; 9. Car. & P. 262; *Broom's Com*: P. 712—13.

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HACKETT, J. *Held*, the latter portion did not override the former as being irreconcilable with it, or on the principle that it denoted a later intention; that rule only applies on failure of every attempt to give the whole such a construction as will render every part of the

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He further directed that the rents and profits of his estates, after deducting expenses of collection and management, should be divided into twenty-four shares, and to be held upon trust for the benefit of his children and grandchildren, whom he named, and their issues. These shares he then proceeded to distribute among his children and grandchildren in certain proportions, and finally directed as follows: "I direct that the annual income of the said share or shares so set apart for my sons and grandsons, and their respective issues in the said trust estate and premises, shall be paid to the same son or grandson during his life, and from and after his decease, that his said share or shares shall be held in trust for all such sons born in my lifetime, at such ages and times as I might by any writing under my hand or by my Will appoint, and in default of such appointment, &c., in trust for all my children, who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, in equal shares, and if there shall be but one such child, the whole to be in trust for such child."

Held, that the direction was not void on the ground of remoteness.

He further devised eleven pieces of land in Penang, which he particularly described, to trustees, and directed the same be called the "Whakoff of Mahomed Noordin." He further directed his trustees out of the rents and profits of such lands, to pay for ever the sum of \$20 monthly to the managing body of a certain school; the sum of \$60 monthly to his daughter, Tengah Chee Mah, and her lawful issue during their natural lives; and also the sum of \$40 monthly for the maintenance of one of his sons and his wife. He then gave the residue of such rents and profits upon trust as follows: "To expend for the yearly performance of kandoories and entertainments for me and in my name to commence on the anniversary of my decease, according to the Mahomedan religion or custom, such kandoories and entertainments to continue for ten successive days every year, and also in the performance of an annual kandoorie in the name of all the prophets, and to expend the same in giving a kandoorie or feast according to the Mahomedan religion or custom, to the poor for ten successive days in every year from the anniversary of my decease to the extent of three hundred dollars, including the costs of lighting up the mosque or burial-place of my deceased mother and the school-rooms thereto adjoining; and also to give kandoories or feasts to the poor aforesaid once in every three months to the extent of one hundred dollars; and provided there should remain any surplus monies, then the same is to be expended in purchasing clothes for distribution to the poor."

Held, [firstly] that the trust for the school was a good charitable bequest and therefore valid.

Held, [secondly] that the gift to Tengah Chee Mah and her issue, was a gift to her for life; for her sole and separate use, with remainder to such of her children as were in existence at the time of the testator's death, as joint tenants for life; and the word "issues" was used therein in the sense of "children" and was a word of purchase and not of limitation, but as the gift was for life only, the children born after testator's death could not be let in.

Held, [thirdly] that the gift of the residue of the rents and profits for kandoories, &c., was not a charitable gift, but void as tending to a perpetuity (A/)

Held, [fourthly] that the gift for clothes to the poor was a good charitable gift, and as the surplus monies with which it was to be paid was sufficiently certain, the gift of the surplus was valid.

The testator gave a legacy to Mahomed Mashoredin Merican Noordin and his issue, and directed that if he died without issue, the share was to go over to Abdul Cauder Jellamy and Rajah Bee and their issues in equal shares. He also gave a legacy to Abdul Cauder Jellamy, and directed that in case he died without issue, his share was to go to Mahomed Mashoredin Merican Noordin and Rajah Bee; during the lifetime of the testator, Abdul Cauder Jellamy died without issue.

Held, that the words "died, leaving no issue" applied to death in the testator's lifetime, and that the gift to Abdul Cauder Jellamy did not lapse, but the ulterior cross gift took effect as a simple absolute gift.

The testator in one portion of his Will devised his lands at Akyab and Tenasserim for certain purposes: in a subsequent part he devised "the rest and residue of his estates" at Penang and Province Wellesley or elsewhere [exclusive of those which he had by deed of gift given to his children and grandchildren] for certain other purposes.

Held, that there was no inconsistency in the two clauses, as the words "rest and residue" excluded what the testator had already given, and the effect of these words not limited by the parenthetical clause.

This was a suit for the proper construction of the Will of Mahomed Noordin, deceased, to have it decided by what law his Will was to be construed, for delivery and cancellation of certain deeds, and for other relief and objects which are set forth in the judgment. The facts and arguments also sufficiently appear therein.

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The case was heard on the 30th and 31st August, 1st, 2nd September, and on this day.

T. Braddell [*Attorney-General*] for plaintiffs.

B. Rodyk [R. C. Woods, junr., with him,] for defendants.

Cur. Adv. Vult.

13th March 1872. *Hackett, J.*—In this case a petition has been filed on the Equity side of the Court by Fatimah, styling herself the widow of the late Mahomed Noordin and Tengah Chee Mah, his daughter, and the husband of the latter against the Executors and the persons interested under the Will of the late Mahomed Noordin, a Mahomedan merchant of Penang, who died here on the 12th April, 1870.

The object of the petition is to obtain a decree of the Court declaring that the deceased died intestate as to all such portion of his moveable or immoveable property as may be found to be disposed of, or attempted to be disposed of, in a way contrary to the law of England, or contrary to the Mahomedan law, if the Court finds that the latter law is in force in the Settlement of Penang in the case of Mahomedans, and that the estate and effects of the deceased may be distributed under the decree of the Court so far as the Will may be found to be inconsistent with the English or the Mahomedan law, according to the rules of the English or Mahomedan law. The petition further prays that such of the defendants as have received deeds purporting to have been executed by the late Mahomed Noordin, and purporting to operate as conveyances of lands or interest in lands, the property of the deceased during his lifetime and which deeds were not delivered during his lifetime, with the intention that the same should operate as conveyances of any interests or estates shall be decreed to bring in the same to be cancelled. The petition also asks for an injunction. At the hearing of the cause there were three preliminary questions argued. First, whether the capacity of the deceased to make a Will was to be decided by the Mahomedan or by the English law. Secondly, whether the 11th clause of the Will, which directed that if any of the testator's sons or daughters, &c., disagreed respecting their shares and proceeded to law in any Court for their shares, such, &c., should only be entitled to five hundred rupees and should forfeit all their shares under the Will, and that the share of any one so disputing, should be divided amongst the rest, is valid. The third question affects only the plaintiff Fatimah and arises upon a plea which alleges her to have been divorced from the deceased some time before his death. The first question is raised in the 15th, 16th, 17th, and 18th paragraphs of the petition, which are as follows:—

"15th. That your petitioners are further advised and charge that there is no valid residuary disposition of the estate and effects of the said Mahc-

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" med Noordin in the said or any other valid Will, and that in consequence, " the greater portion of the said estate will fall to be distributed according " to the statute for the distribution of intestates' estates or by Mahomedan " law, in which case your petitioners are interested as next of kin of the said " deceased. 16th. Your petitioners further state that the deceased was " born in the Settlement of Penang, in the year 1802, before the publication " of the first Charter of Justice under Royal Letters Patent of 1807 for the " said Settlement, that the Settlement was then under the Government of " the Presidency of Fort William in Bengal, and subject to the same laws as " that Presidency. 17th. That in the Presidency of Fort William in Bengal, " Mahomedan law is and was administered to inhabitants professing the Maho- " medan religion, and that law existed in Penang before the publication of " the first Charter of Justice, and was not altered in this respect by the first " or any subsequent Charter passed under Royal Letters Patent for the " administration of justice in the said Settlements. Wherefore your petitioners " are advised and charge that the matter in question of the estate of Maho- " med Noordin ought to be administered and the estate dealt with according " to Mahomedan law. 18th. That your petitioners are advised and charge " that the said Will is not in accordance with Mahomedan law, and your " petitioners charge that by law, the estate and effects of the deceased " ought to be distributed in certain fixed shares or proportions amongst the " next of kin according to Mahomedan law, subject to such bequests as may " be found in the deceased's Will to be in accordance with Mahomedan law."

The defendants in their answer admit that Mahomed Noor-
din was born in Penang, but do not admit that he was born
before the passing of the Charter of Justice of 1807, and there is
no evidence whatever as to the exact date of his birth. But they
altogether deny that the Settlement of Penang was then [that is
previous to 1807] under the Government of the Presidency of
Fort William in Bengal or subject to the same laws as that Pre-
sidency. And they further say that even if the Settlement of
Penang was, previous to the said Charter of Justice, subject to the
same laws as the said Presidency, such fact does in no way affect
the question as to the law by which the said Will ought to be con-
strued or by which the said estate and effects should be adminis-
tered. The defendants also deny that in the Presidency of Fort
William in Bengal, Mahomedan law is and was administered to
inhabitants professing the Mahomedan religion, or that the Maho-
medan law existed in Penang before the publication of the first
Charter of Justice, or that it was not altered in this respect by the
first or any subsequent Charter of Justice.

In his argument upon this part of the case, the Attorney-
General, for the plaintiffs, maintained two propositions, first,
that previous to the Charter of 1807, Mahomedan law was in
force in Penang; and secondly that the Charter made no alteration
in the law in this respect. In support of the first proposition, he
argued that Penang being a part of the territories of the Rajah of
Quedah, a Mahomedan Prince, the Mahomedan law continued in
force after the cession until it should be altered by competent
authority, and he contended that there is no evidence of any
attempt to alter the old law or to introduce a new one until the
publication of the Charter of 1807.

It appears to me that this position is untenable. In 1786, Penang
being then a desert and uncultivated island, uninhabited except
by a few itinerant fishermen, and without any fixed institution,
was ceded by the Rajah of Quedah to Captain Light, an officer of

the East India Company, for and on behalf of the Company. On the occasion of taking possession of the Island, Captain Light published the following proclamation:—

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"These are to certify that, agreeable to my orders and instructions from the Honorable Governor-General and Council of Bengal, I have this day taken possession of this island called Pooloo Penang, now named the Prince of Wales' Island, and hoisted the British colors in the name of His Majesty George the Third, and for the use of the Honorable English East India Company, this eleventh day of August, One Thousand Seven Hundred and Eighty-six, being the eve of the Prince of Wales' birthday.

"In the presence of the under written,

"FRANCIS LIGHT."

Immediately after the Island had been thus formally occupied, its settlement commenced, and the enterprise was so successful that in three years from the date of the original settlement, we find Captain Light stating that there was a population of 10,000 persons settled in the island, and that this number was being continually increased.

Here we have the fact that an island virtually uninhabited, is occupied and settled by British subjects in the name of the King of England. The case therefore would seem to fall within the general rule laid down in our law books and which Lord Kingsdon thus expresses in a recent case: "When Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community, become also partakers of and subject to the same laws" [2. *Moo. P. C., N. S.* 59]. But it seems to have been thought that Penang did not come within the operation of the rule to which I have referred for two reasons, first, because the island was not altogether vacant of inhabitants; and secondly, because it was taken possession of on behalf of the East India Company and was therefore not directly subject to the English Crown. But it can scarcely be seriously contended that the few wandering fishermen who were found on the shores of the island, could be regarded in the same light as the inhabitants of a settled country with laws of their own, and who are entitled to the benefit of them until changed by competent authority. Neither do I think that the circumstance of possession of the island being taken by an officer of the East India Company, for and on behalf of the Company, prevented the transfer of the sovereignty and dominion of the island to the Crown of Great Britain and Ireland. Nothing can be clearer than the determination of Parliament to preserve the undoubted sovereignty of the Crown of England over the territorial acquisitions of the Company. This is shewn by the declamatory clause in Act 53, Geo. III., c. 155, s. 95: "Provided always that nothing herein contained shall be construed to extend to prejudice or affect the undoubted sovereignty of the

* This proclamation was published for the first time in the *October* number of the *Journal of Indian Archipelago*, 1850, p. 629, and was apparently obtained from the Government records.—J.W.N.K.

HACKETT, J. “ Crown of the United Kingdom of Great Britain and Ireland in 1871. “ and over the said territorial acquisitions.” And indeed it is difficult to conceive how any English Company could, without the clearest and most positive expression of the intention of the Legislature, be made exempt from that allegiance which all British subjects owe to the laws of their country.

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But it has also been argued by the Attorney-General, that Penang was a dependency of Fort William in Bengal, and therefore subject to the same laws as that Presidency. And as by the laws in force in Bengal, Mahomedans were entitled in all matters of contract, inheritance, or succession, to the benefit of their own law, Mahomedans in Penang must be held entitled to the same privilege.

In support of his proposition he has cited 13 Geo. III, c. 63, s. 38, which empowers the Governor-General and Council at Fort William to make Rules and Ordinances for government of places subordinate thereto, and 21 Geo. III., c. 70, s.s. 17 and 18.

But with regard to the first mentioned Act, it is sufficient to observe that no laws or regulations ever were made in pursuance thereof which affected the Settlement of Penang; indeed it is not a little remarkable that for many years, the Indian Government was of opinion that it had no power to legislate for the island, and it is only about the year 1800, that we find the Advocate-General of the Indian Government expressing his opinion that the Governor-General was authorized to enact laws, civil and criminal, for the government of Prince of Wales' Island in the same manner as he did for the Province of Bengal.

And as to Act 21 Geo. III., c. 70, s.s. 17 and 18, they in terms apply, only to the jurisdiction of the Supreme Court at Fort William, over the inhabitants of Calcutta, and therefore do not affect the question.

The Attorney-General also called my attention to what he terms an ordinance of the Governor-General in Council which he said has been overlooked by all the Judges. It is found in a letter of instructions addressed by the Chief Secretary to the Indian Government to Sir George Leith, Lieutenant-Governor of the island, dated 15th March, 1800.

In this letter under the heading of “ *Administration of Civil and Criminal Justice* ” the Governor-General in Council says: “ 16th. The laws of the different people and tribes of which the inhabitants consist, tempered by such parts of the British law as are of universal application, being founded on the principles of natural justice, shall constitute the rules of decisions in the Courts.” [a] But independently of the objection that this regulation is contained in a mere letter of instructions, the paragraph which follows, shows that it was not intended to operate as a binding law, but was simply a direction to frame regulations in accordance with the principle thus laid down. In paragraph 17, the Governor-General goes on: “ You will accordingly proceed to “ frame regulations for the administration of justice to the native “ inhabitants founded on the above principles.” [a]

[a] See *Preface*, &c., time of Sir George Leith, Bt., 1800-1803.

And it is quite certain that Mr. Dickens, who was sent about the same time to act as Judge at Penang, never regarded the instructions contained in the letter as having the force of law.

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Sir Benson Maxwell, in the case of *Regina v. Willans* [a] seemed to think that Penang could not be considered a British Colony in the ordinary sense of the word, and expressed his opinion that Capt. Light and his companions were a mere garrison, and that having regained the temporary nature and object of their inhabitancy, the law of England can hardly have been made the *lex loci* by them; but with all respect for the opinion of that learned Judge, I think the facts do not support it. Capt. Light was not merely the commander of a garrison, but was also an able administrator under whose rule the infant Settlement progressed so rapidly that, as has already been seen, in three years from its foundation, it contained a population of 10,000 people.

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But, as has been observed by Sir B. Maxwell in the case above quoted, whatever ought *de jure* to have been the law of the land when the Colony was founded, it is quite clear that for the first twenty years of its existence, no body of known law was in fact recognized as the law of the place. This appears clearly from a report made by Mr. Dickens. Writing in 1803, this gentleman says, "His Excellency in Council has been heretofore informed, that Prince of Wales' Island, prior to its cession in 1786, was "under the dominion of a chief who governed arbitrarily and not "by fixed laws. It is now my painful duty to state, that it has "so continued to be governed without fixed laws, for upon the "hour of my arrival on this island, there were not any civil or "criminal laws then in existence, and there are not now any "municipal, civil or criminal laws in force on this island." [b] Unless Penang did not fall within the general rule as to the settlement of uninhabited countries, it would seem more correct to say that there were not any legally instituted Courts to administer the law, than that there were no laws whatever in force.

The Charter of Justice of 1807 seems to have set at rest this vexed question of the *lex loci* of Penang. In India, the Judges have in a long series of judgments, which have not been dissented from by the Privy Council, held that the first introduction of English law into Calcutta was effected by the Charter of George I., by which, in the year 1726, the Mayor's Court was established, and the Judges of this Settlement have felt themselves bound by the uniform course of authority, to hold that the introduction of the King's Charter had a similar effect here. The question has been re-opened by the Attorney-General, and he has maintained, in opposition to the views I have mentioned, that the King's Charter of 1807 had no effect upon the law of the place, being a mere machine through whose instrumentality the law is enforced. He also relied on the circumstances that the Court is directed in civil matters, to give judgment, not according to the law of England, but according to justice and right. But, as Sir Barnes

[a] See Magistrates' Appeals, Vol. III. of these Reports.

[b] See § 6 of Mr. Dickens' letter of 21st June, 1803—*Preface*, &c., 1800-1803.

HACKETT, J. 1871. Peacock observed in the case of the *Advocate-General of Bengal v. Ranee Samonoye Dorse* [9 Moo. Ind. App. 398], speaking of the Charter of George I. [and his remarks are equally applicable to the Penang Charter of 1807], "there can be no doubt that it was intended that the English law should be administered as nearly as the circumstances of the place and of the inhabitants should admit. The words 'give judgment according to justice and right,' in suits and pleas between party and party, could have no other reasonable meaning than justice and right according to the laws of England, so far as they regulated private rights between party and party." But if the current of authority which has flowed so long in one direction, is to be disturbed, it cannot be in this Court, I am therefore of opinion that *quâ cunque viâ*, either on the settlement of the island, or if not then, by the Charter of 1807, the law of England was introduced into Penang, and became the law of the land, and that all who settled here became subject to that law. It is scarcely necessary to add, that our Charters contain no provisions corresponding to those of the Indian Charter, which confers certain privileges on Mahomedan Gentooos, and therefore that there is no ground to hold them exempt from subjection to the law of the place. It follows from what I have said, that inasmuch as English law has prevailed in Penang certainly ever since the publication of the first Charter in 1807, and Mahomed Noordin was domiciled here at the time of making his Will and up to the time of his death, that his capacity to make a Will must be decided not by Mahomedan law, but by the *lex loci*, which here, is the law of England as it has been modified by the Indian and Colonial Legislatures. And it appears to me that there is no hardship to Mahomedans in holding this. As Sir. B. Malkin observed in *Abdullah's Case*, it is the fault of native holders of property if any inconvenience results from such a decision. And that the law as then established gives the most unlimited freedom of disposal of property by will, "any man who wishes his property to devolve according to the Mahomedan, Chinese, or other law has only to make his Will to that effect, and the Court will be bound to ascertain that law and apply it for him." [a] The next question arose on the eleventh clause of the Will, which is as follows: "I do hereby strictly direct that hereafter if any of my sons, daughters, grandsons or grand-daughters herein mentioned, or any of their issue, disagree with each other respecting their shares mentioned herein, disputing to sell my real property, and proceeding to law in any Court or Courts for their said shares, each or any one of them so doing or disputing, shall only be entitled to receive the sum of Company's rupees five hundred, and forfeit all his, her, or their share, that I have proportioned in this my Will and have no more claim to my estate and I direct my executors and trustees to pay the above sum of Company's rupees five hundred to such disputing son or daughter, grandson or granddaughter, or their issue, as aforesaid, and the share or shares of such disputing son or daughter, grand-

[a] Vide

"son or granddaughter, or their issue, to be divided amongst the rest of them whose names are mentioned in this my Will."

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It has been contended on behalf of the plaintiffs, that the clause is void as being repugnant and inconsistent with the gifts.

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Mr. Rodyk for the defendant, in opposition to this contention, relied upon the case of *Cook v. Turner*, 14 Sim. 493, in which a clause of revocation and gift, even if the devisees should dispute the Will or the testator's competency to make a will, were held valid. But it seems to me that the proviso in the present case more resembles that in the case of *Rhodes v. Muswell Hill Land Company* [30 L. J. N. S., ch. 509], where the Master of the Rolls decided that a proviso that if any dispute arose between his devisees, it should be referred to arbitration, and that if any devisee took proceedings at law or in equity, his estate should go over, was invalid, as being repugnant and inconsistent with the gifts. In that case the Master of the Rolls said: "The effect is the same as if the testator had said: 'I give you this property and I impose on you a condition, that if you resort to any legal proceedings necessary to secure the gift, you shall lose it.'" Any such stipulation would be absurd, as property is inseparable from the right to institute legal proceedings, and the protection of the law. "If it was once ascertained that a party was unable to take legal proceedings to substantiate his title, the very persons against whom he was to enjoy the property, would take possession and keep it, and they would have the advantage of the conditions and ultimately the protection of the law, as after a certain time, it would recognize their right to the property." In the present case the devisees and legatees are prohibited from "proceeding to law in any Court or Courts for their said shares."

It seems to me that the very proviso is open to the very same objection as that in *Rhodes v. The Muswell Hill Land Company*, and that it is equally inconsistent and repugnant to the devisee. I am of opinion therefore that it is void. The third question is that arising on the plea of Daniel Logan and others of the defendants. The plea in effect alleges, that the petitioner Fatimah was duly divorced from her husband the late Mahomed Noordin, according to the Mahomedan law and religion, and that she was never re-married to him. There is no dispute as to the marriage, and the only question is, whether there was a regular divorce according to Mahomedan law.

Several witnesses were examined on behalf of the defendants to prove the divorce. Vappoo Noordin, the eldest son, said that he had heard of the divorce and had seen the paper of divorce, but was not present on the occasion. The witness also proved his father's signature in two books produced in Court, purporting to be records or registers of the divorce [Exhibits A. & B]. Nina Noordin, the second son, stated that his father was divorced from Fatimah in 1852, when she went to live in a separate house in the same compound. That he does not believe his father ever cohabited with Fatimah after the divorce. That his father said he divorced her on account of her inattention during his illness. He said that his

HACKETT, J. father frequently spoke of the divorce, and that it was thoroughly understood in the family that she was divorced.

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FATIMAH & The witness accounts for the fact of Fatimah's being allowed
ORS. to remain in his father's compound, by the circumstance that her
LOGAN & ORS. daughters were living there. He further states that in the year 1865, the daughter Chee Mah, having left the house clandestinely in which she was living with her mother, Fatimah, his father told the witness to go and tell Fatimah "she must leave the house as "she was a divorced woman," and that she was accordingly turned out. The witness however states that Fatimah came to the house four or five days before the death of Noordin. Nonia Soo Eng states that she lived in Noordin's house as a concubine for twenty years before his death. She says that Noordin got angry with Fatimah during his illness, because she did not attend to him, and that next day he assembled all the women in the house, and also two men named Alliar and Hadjee Lebby, and directed the witness to bring his bag of rupees. That he then took three rupees and giving them to Fatimah, said "there's your *taluk*! Take your "*taluk* and go; don't remain here!" That then her daughter, Mah Chee, came and cried bitterly and said "as you will have nothing "to do with her, I will take my mother." That Fatimah then went and lived with her daughter. The witness stated on cross-examination that Fatimah lived in the same house, on a different side, with her daughter, and that after a year she removed with her daughter to another house, built in the same compound. The witness states that all the other witnesses to the divorce are dead, except the other, Nonia [next witness]. Nonia Ugay Eh, another concubine of the testator, gave much the same description of the divorce. She says that the testator gave three rupees to Fatimah and said "Here is your *taluk*; you and I are no more "man and wife;" that after taking them, Fatimah went downstairs and cried. That her daughters also cried. That her eldest daughter asked Noordin if her mother might live with her. That he said he did not care, but that she must leave the house; that the daughter cried more and more and begged her father to relent. And that at length he said, his daughter might do as she pleased. That Fatimah then went to live in her daughter's apartment, and afterwards went to live in another house.

The plaintiff Fatimah altogether negatives the statement of these witnesses, and denies in the most positive manner, that she was ever divorced from her husband. But, I confess, I don't think any reliance can be placed on her testimony, as she pleads ignorance of certain circumstances with which it is impossible to suppose that she was not acquainted.

How can it be supposed for instance, that she can have been ignorant of the fact that the belief was prevalent in the household, that her husband had divorced her on account of her inattention to him during his illness.

Then assuming as I think upon the evidence, it must be assumed, that Noordin took care to have the fact of the divorce registered in Khatib's book, can it be supposed for a moment that the person most interested in the matter, knew nothing of it particularly when we couple with it the facts that Fatimah

removed to her daughter's apartments, and within a year after went to live in another house? The evidence of Tengah Chee Mah, Fatimah's daughter, does not seem to me to be material, as she was too young to have known of the divorce at the time it is alleged to have been made.

Then there was the evidence of Mahomed Ally, a Khatib or priest of the Mahomedan mosque. He produces the following paper :—

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COPY OF DIVORCE.

"In the year 1268, on Tuesday, in the day-time, in the 22nd day of the month of Shawal, in Penang, Merchant, Mahomed Moordin Mericayar's wife's original name was Echee. At the time of the writing of the marriage paper a name was given and she was called Fatimah. Merchant Mahomed Noordin Mericayar gave unto that woman three taluks and settled. The witnesses thereto are, Kazi Haji Hussain, Court Shroff Alliar, and Haji Lebby.

"Written by Mahomed Salleh, son of Nacodah Tomby Sahib.

"MAHOMED NOORDIN [*in Tamil*].

"MAHOMED NOORDIN [*in English*]."

and says that he saw Mahomed Noordin sign it. The book in which it is written, is a register of marriages and divorces kept for the Mahomedan community. He says that the entry was made on the day in which it bears date, in Noordin's house and by his desire. The witness stated that the giving of the three taluks was sufficient to constitute a divorce according to the doctrine of the Safutes.

The next witness was Hajee Abdul Gunny, a Doctor of Mahomedan law. He stated that if a man gives his wife three taluks, and says he divorces her, the divorce is good provided that she heard it. This witness said further, that there must be two or three good men as witnesses of the divorce. That these witnesses must say they saw the taluks given. That if a divorce is in writing, it must reach the hands of the wife. That the entry in the book is insufficient, unless the witnesses should come forward and prove that they were present at the time of the divorce. On further examination the witness stated, that if a Mahomedan husband divorces his wife and there is no witness, still the divorce is good. Evidence was given to shew that Mahomed Noordin belonged to the Safute sect of Mahomedans.

The next witness was a Kazi, Haji Mat Shera. He states that if a man takes three rupees and gives them to his wife and says, "take your taluk and go," that is a revocable divorce; but if after the husband's death, the wife was to deny the divorce, it would not be valid, as there would not be sufficient evidence of it. The witness further stated that the evidence of two concubines would not be sufficient to prove a divorce. The result of the whole evidence, I think, is that in the year 1852, Mahomed Noordin was deeply offended with his wife for her alleged neglect of him during his illness, and that in consequence, he summoned all the women of the household and other persons, as witnesses, and in their presence gave her three taluks and formally divorced her, commanding her to leave the house, but on the entreaty of his

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daughter, he allowed her to occupy a part of her daughter's apartment until she removed to another house. He also appears to have summoned the khatib of the mosque, and ordered him to make an entry of the fact of the divorce in the register of marriages and divorces, which entry was doubtless intended to be an enduring proof of the fact.

As the Mahomedan law is a foreign law to us and is not, as it is in India, to a certain extent part of the law of the land, there is some difficulty in ascertaining what the law is, in a satisfactory manner. But, I think, it may be sufficiently collected from the evidence of the three learned Mahomedans who have been examined, that the divorce spoken of by witness Nonia Soo Eng and Nonia Ugay Eh, was a valid divorce according to the doctrines of the Safutes, the sect to which Mahomed Noordin belonged.

It is true that such a divorce is said to be revocable. It may be so. But there is no evidence that it ever was revoked. The fact that after the alleged divorce, Fatimah left the conjugal apartment and went to live with her daughter in another part of the house, and that subsequently she removed to another house, and never again returned to live in the house of her husband [except when her husband was on his deathbed], seems to me inconsistent with the supposition that she was ever restored to the position of a wife. The evidence of Nina Noordin, who states that in 1864, thirteen years after the alleged divorce, his father told him to order Fatimah to leave the house in which she was living, "because she was a divorced woman," shews clearly that Noordin himself considered the divorce as binding, and it may be not immaterial to mention as sure evidence of Noordin's estrangement from his former wife, and the mother of his children, that she is not even named in his Will.

It has also been urged by the Attorney-General that there is not sufficient evidence of the divorce, because the two concubines who testify to having been present, are competent witnesses according to Mahomedan law. But in my opinion that is no reason why their evidence should not be received in this Court. According to Story [*Conf. Laws*, 634], "the course of procedure ought to be according to the law of the *forum* where the suit is instituted. . . . The admission of evidence, and the rules of evidence, are rather matters of procedure than matters attaching to the rights of parties . . . and therefore they are to be governed by the law of the country where the Court sits." And Lord Brougham states [in *Bain v. Whitehaven Ry. Co.*, 3 H. L. C. 19]: "As to the stipulations of contracts, our Courts are bound by foreign law. But it is a totally different thing as to the law of evidence. Whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not, that it is to be determined by the law of the country where the question arises, where the remedy is so ought to be enforced, and where the Court sits to enforce it."

I therefore think that the objection to the testimony of the two concubines on the ground of their incompetency, cannot be

sustained, and on the whole I am of opinion that the plea alleging the divorce has been proved. HACKETT, J.
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I will now proceed to consider those portions of the Will which have been attacked by the plaintiffs. FATIMAH &
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The 6th paragraph of the petition was abandoned by the Attorney-General, and need not be considered.

The 7th paragraph states that the testator by his Will, in the 3rd section, bequeathed certain personal property, consisting of household furniture, wearing apparel, plate, crockery, jewellery, and other things, to two of his natural sons, and in a subsequent section of the Will, the whole of the testator's personal estate and effects whatsoever are bequeathed to the executors of the Will in trust, and the petition goes on to charge that the subsequent bequest of the personalty, overrules and renders void the previous bequest to the two natural sons. The sections thus referred to, are as follows:—[3rd and 4th secs. read *in extenso*.]

The contention is, that these two sections are irreconcilable, so that they cannot possibly stand together, and therefore the 4th section must prevail, on the principle that the subsequent words of the 4th clause are considered to denote a subsequent intention. But this rule, which sacrifices the former of several contradictory clauses, is never applied, but on the failure of every attempt to give to the whole, such a construction as will render every part of it effective [1 *Jarm.* 445]. Now here we have in the 3rd section, gifts of certain specific parts *nominatim* of the testator's personal property, and in the subsequent section, a gift of all his personal estate and effects whatsoever and wheresoever. This, it seems to me, is a case in which the rule, that a devise or bequest in general terms shall not be held to control another devise or bequest made in distinct terms, may be properly held to apply.

In *Borrell v. Haigh* [2 Jur. 229], a testatrix devised all her messuages, cottages, closes, land, and hereditaments at H. to A. and afterwards gave all her copyhold estates and hereditaments at N. and T. and *elsewhere*. It appeared that the only place besides N. and T. in which the testatrix had copyholds, was H., but Lord Langdale held that the prior devise, which clearly carried the copyholds at H., was not defeated by the vague expression which followed. Upon the same principle, I think, the specific bequests in the 3rd section of the Will, are not defeated by the general bequest contained in the 4th section.

The next question is one raised in the 7th paragraph of the petition and arises in the 5th clause of the Will.

By that clause, the testator after certain bequests, directs the residue of the property, divided and bequeathed in the 4th clause, to be divided into twenty-four equal shares, and he then proceeds to distribute these shares among his children and grandchildren in certain proportions, and gives one of these shares to his grandson Abdul Cauder Jellamy. Abdul Cauder Jellamy having died in the lifetime of the testator without issue, it is contended that his share lapsed, and I think there can be no doubt that his share did so lapse, and that it falls into the general residue of the testator's estate.

HACKETT, J. The next question arises on the 6th section of the Will. By
 1871. that section the testator devised eleven pieces of land in Penang,
FATIMAH & particularly described in his Will, to trustees, and directed that
ORS. the lands should be called the "Whakoff of Mahomed Noordin;"
v. and he further directed his trustees, out of the rents and profits of
LOGAN & ORS. the said lands, to pay for ever the sum of twenty dollars monthly
 to the managing body of a school in Chulia street, Penang; also
 the sum of sixty dollars monthly to the petitioner, Tengah Chee Mah,
 and her lawful issue during their natural lives, the sum of forty
 dollars monthly for the maintenance of one of his sons and his
 wife. The testator then gave the residue of the said devised
 premises upon trust as follows: "To expend for the yearly per-
 formance of kandoories and entertainments for me and in my
 name, to commence on the anniversary of my decease according
 to the Mahomedan religion or custom, such kandoories and
 entertainments to continue for ten successive days every year,
 and also in the performance of an annual kandoorie in the name
 of all the prophets, and to expend the same in giving a kan-
 doorie or feast according to the Mahomedan religion or custom,
 to the poor, for ten successive days in every year, from the anni-
 versary of my decease, to the extent of three hundred dollars,
 including the cost of lighting up the mosque or burial-place of
 my deceased mother and the school-rooms thereto adjoining.
 And also to give kandoories or feasts to the poor as aforesaid,
 once every three months, to the extent of one hundred dollars,
 and provided there should remain any surplus moneys, then the
 same is to be expended in purchasing clothes for distribution to
 the poor."

The petitioners maintain [*see* 10th paragraph of petition] that
 this devise is bad in law, and that the said eleven pieces of land
 should fall in the residue of the testator's estate.

Now this is a devise to trustees upon certain trusts which
 I will take *seriatim*. First, then there is a trust in favor of a school,
 built by the testator "for the learning in English, Hindoostanee,
 Malay, Tamil, Malabar, and the Alkoran" which seems to
 me a good charitable gift and therefore perfectly valid. Then
 there is a trust for the support and maintenance of testator's
 daughter, Tengah Chee Mah, the sum of sixty dollars per
 month to be paid to her and her lawful issues during their natu-
 ral lives, for their sole and separate use, without power to dispose
 of the same by way of anticipation. Here the testator evidently
 intended to make a provision for his daughter and her children.
 But the manner in which it is to be carried out, is not very
 intelligible. *Prima facie*, it is a gift to his daughter and her
 children jointly, but then there are the words "for their and
 her sole and separate use without power to dispose of the
 same in the way of anticipation," and besides there is the com-
 mencement of the clause containing the gift in which it is said to
 be "for the support and maintenance of my daughter, Tengah Chee
 Mah," showing that she was the primary object of the testator's
 bounty. On the whole I think, I shall best effectuate the testator's
 intention by holding it as a gift to his daughter for life, for her

sole and separate use, with remainder to such children as were in existence at the time of the testator's death as joint tenants for life. The word "issues" seems to be used in the sense of "children." At any rate it must be construed as a word of purchase and not of limitation, and as only life estates are given to the "issues," I do not think the gift can be construed so as to let in children born after the testator's death. Then there is a sum of forty dollars per month to be paid to Shaik Meydin for the maintenance of Beebee and Habib Mahomed Merican Noordin in accordance with the terms of a certain marriage settlement. Upon this no question has been raised. Then there is the trust of the residue of the rents and profits of the subject of the devise, and I have to express my regret that the question of the validity of these trusts were not more fully argued. The purpose of this trust seems to be of a ceremonial, religious, and also of a festive nature. They are described by the testator as "kandoories and entertainments for him and in his name, to commence on the anniversary of his decease according to the Mahomedan religion or custom." In another place he speaks of "an annual kandoorie in the name of all the prophets," and also of a "kandoorie or feast according to the Mahomedan religion or custom to the poor for ten successive days every year from the anniversary of my decease." The clause concludes by directing that kandoories or feasts shall be given to the poor as aforesaid once in every three months, to the extent of one hundred dollars, and directs that any surplus which should remain, shall be expended in purchasing clothes for distribution to the poor. This clause was not discussed at any length, and I have no means of knowing the meaning of the word kandoorie except from the context, as there was no evidence on the point. But the whole object of this clause seems to be to provide funds for certain ceremonial entertainments to be given in honour of the testator, in accordance with the Mahomedan religion or custom. As the gift is to last for ever, the question arises whether it is charitable or not, as if it is not, it is void as tending to a perpetuity. No evidence was given to shew the nature and object of these feasts and kandoories, and whether they are enjoined by the Mahomedan religion, and I am therefore left to form my opinion from the words of the Will itself, and I confess that looking at the description of the objects of the testator's bounty in the most liberal manner, it does not appear to me that they can, in any sense of the word, be called charitable. I do not see how it can be of any public utility to give feasts even when those feasts are to be enjoyed by the poor. For although it would be good charity to give alms to the poor, a feast can scarcely be regarded in the same light. On the whole I am of opinion that the gifts in the clause are not charitable, and that they are therefore void.

The only remaining question on this part of the Will is, as to the gift of the surplus monies "to be expended in purchasing clothes for distribution to the poor." When a testator gives funds for purposes which are illegal or unattainable, and gives what may remain after providing for those purposes to a purpose

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HACKETT, J. 1871. which is legally good, the question of the validity of the gift of the surplus would seem to depend on whether the exact amount to be laid out on the prior purposes, is either specified or can be ascertained [*Chapman v. Brown*, 6 Ves. 404; *Limbrey v. Gurr* 6 Mad. 151]. The language of the testator here, is not very clear, but I think the clause may be construed, without doing violence to the language used, by holding that the words "to the extent of "three hundred dollars," apply to the whole preceding clause, so that there would be an annual gift of that amount for all the purposes previously mentioned. Then comes the gift of one hundred dollars once in every three months, for giving feasts to the poor, about which there is no doubt, and then we have the gift of the surplus. If I am right in this construction, the testator would have given altogether the sum of seven hundred dollars annually for the kandoories or feasts, and the surplus, if any should remain, was to be expended in purchasing clothes for the poor. According to this reading of the clause, the surplus is perfectly capable of being ascertained, and there is therefore no objection to it on the ground of uncertainty, and as the gift seems to me to be a good charitable gift, I am of opinion that the gift of the surplus is valid.

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The next question arises upon the 7th clause of the Will. By that clause, the testator devises to his trustees all the rest and residue of his real estate in Penang or Province Wellesley or elsewhere, [exclusive of what he had by deeds of gift given to his children and grandchildren] upon the following trusts. That his trustees should lease or let the said lands for any term not exceeding seven years, and should hold the net income thereof, after deducting the expenses of collection and management, and divide it into the twenty-four shares, which shares were to be held upon trust for the benefit of his children thereafter named and their issue. The testator then proceeds to distribute these twenty-four shares amongst his children and grandchildren in certain proportions, and finally directs as follows: "I direct "that the annual income of the said share or shares so set apart "for my said sons and grandsons, and their respective issues in "the said trust estate and premises, shall be paid to the same "son or grandson during his life, and from and after his decease, "that his said share or shares be held in trust for all such ones, in "room of his children and remoter issue born in his lifetime at "such ages and times as he may by any writing under his hand or "by his Will appoint, and in default of such appointment, &c., in "trust for all his children who being a son shall attain the age of "twenty-one years or being a daughter shall attain that age or "marry, in equal shares, and if then there shall be but one such "child, the whole to be in trust for such child." Then comes a hotchpot clause, and then there are cross-remainders between the different devises.

Upon this devise, the Attorney-General has contended in the first place that it is void from remoteness. But I confess, I am unable to see in what manner it violates the rule against perpetuities. The land is given to the trustees in trust to pay the annual

income to his sons, &c., for their lives, and from and after their decease to hold their respective shares in trust for all or such one or more of his children or remoter issue born in his lifetime at such ages and times as each of his sons, &c., may, by writing under his hand or by his Will appoint, and in default of appointment, &c., in trust for all his children. Now the effect of this devise is, to each of his sons, &c., a life estate in his share and a power of appointment among his children or remoter issue born in the lifetime of the tenant for life, which, as the appointees are persons competent to have taken directly under the Will, seems to me a perfectly good limitation.

The Attorney-General then contended that certain of the shares given in the seventh clause of the Will have lapsed.

First, as to "one share" which is directed to be set apart and held in trust for his son, Mahomed Mashoredin Merican Noordin, and his issue, but in case he should die leaving no issue, then his share to go to the use of Abdul Cauder Jellamy and Rajah Bee and their issue in equal shares; and secondly as to the "one share" directed to be held apart, and held in trust for Abdul Cauder Jellamy and his issue but in case he should die leaving no issue, then his said share to go to the use of Mahomed Mashoredin Merican Noordin and Rajah Bee and their issue in equal shares. Abdul Cauder Jellamy having died in the lifetime of the testator without issue, the petitioners contend that the said shares fall into the undisposed residue of the testator's estate. There are two questions here, first, as to the share of Mahomed Mashoredin Merican Noordin. The testator directs that if he should die leaving no issue, then his share should go to Abdul Cauder Jellamy and Rajah Bee and their issue. Mahomed Mashoredin M. Noordin has survived the testator and has become entitled to his share, and as the event in which the gift over is to take effect, may never occur, it is premature to discuss the question whether the words "die leaving no issue" apply to the contingency happening as well after as before the death of the testator. Secondly, as to the original share of Abdul Cauder Jellamy. The testator gives it to his grandson, Abdul Cauder Jellamy, and his issue. But in case he should die leaving no issue, then his said share is to go to the use of Mahomed Mashoredin M. Noordin and Rajah Bee and their issue in equal shares. The petitioners contend that this share has lapsed by the death of A. C. Jellamy in the lifetime of the testator, and that the gift over does not take effect. But it appears to me that this is not so. The testator gives these shares to his children and grandchildren in strict settlement, and subsequently provides for the event of any of his children who survived him leaving no issue to take under the trusts of the Will. Now it appears to me that this furnishes a reason for supposing that the testator in giving over the share of A. C. Jellamy on his death without issue intended to refer to his death in the lifetime of the testator, because the event of his surviving the testator and having no son or daughter to take his parent's share is fully provided for in the general clause establishing cross-remainders between all the devisees under the portion of the Will. But however this may be, there is high authority for holding that the

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HACKETT, J. 1871. words "die leaving no issue" apply to death in the lifetime of the testator. The general rule mentioned in *Jarman* [2 Jarm. 713] that where the gift is to a designated individual, with a gift over in the event of his dying without having attained a certain age, or under any other prescribed circumstances, and the event happens accordingly in the testator's lifetime, the ulterior gift takes effect immediately on the testator's decease as a simple absolute gift, seems to me to apply. I therefore think that there is no lapse in this case and that the gift over takes effect. The petitioners further contend that the gift in the 7th clause of the Will of the rest and residue of the testator's real estate in Penang and Province Wellesley or elsewhere, is inconsistent with that contained in the 4th and 5th clauses of the Will, by which the testator disposes of all his real and personal estate in Akyab and in the Tenasserim Provinces. But I confess I am unable to see the inconsistency. The words "rest and residue" exclude what the testator has already given, and the effect of these words does not appear to me to be affected by the parenthetical clause, "exclusive of those which I have by deeds of gift given to my children and grandchildren." I am therefore of opinion that the gift in the 4th and 5th clauses is not affected by the disposition contained in the 7th clause of the Will.

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PENANG. A plea claiming a right-of-way under the Prescription Act 2 & 3 Wm. IV., Cap. 74, is bad on demurrer, as this Act does not extend to the Straits Settlements.
HACKETT, J. 1872.

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This was an action of trespass. There were several pleas. The fourth plea was as follows: "And for a fourth plea the defendant says that, at the time of the alleged trespasses, Walter Gillespie, James Gillespie, and William Lorrain Hill were possessed of land whereof the occupiers for 20 years before this suit enjoyed as of right and without interruption, a way on foot and with horses and other cattle and with carriages from a public highway over the said close of the plaintiffs to the said land of the said Walter Gillespie, James Gillespie, and William Lorrain Hill, and from the said land of the said Walter Gillespie, James Gillespie, and William Lorrain Hill over the said close of the plaintiffs to the said public highway, at all times of the year, for the more convenient occupation of the said lands of the said Walter Gillespie, James Gillespie, and William Lorrain Hill; and that the alleged trespasses were a use of the said way by the defendant as a servant of the said Walter Gillespie, James Gillespie, and William Lorrain Hill, and by their commands and under their authority."

The plaintiff demurred to this plea and joined issue on the others, the marginal note of the demurrer being as follows: "A matter of law intended to be argued is, that the title by which the right-of-way is in and by the said plea claimed to have been obtained, is unknown to the law; and that the facts in such plea disclosed, give no right or title to the parties [as whose

"servant and by whose command and under whose authority the defendant acted] to commit the trespass complained of, and cannot therefore justify the defendant himself in so doing."

The defendant joined in demurrer.

B. Rodyk, in support of the demurrer, contended that the plea was bad, as the Prescription Act 2 & 3 Wm. IV, c. 71, on which it was founded, B. & L. 811 [3rd ed.], did not extend to the Straits.

Bond, contra, contended that the plea was good, as the Act did extend, and there was no reason why it should not extend.

Hackett, J., held that the Act did not extend; for if it did, it would work great hardship among the ignorant natives of the place, and therefore the plea was bad.

Demurrer allowed with costs. [a]

KO BO AN v. PUNGHULU SHAIK BEENAN.

By section 29 of Act XLVIII of 1860, in an action against a Police Officer for any thing done, or intended to be done, by him in the execution of his duty, it is not only necessary to allege in the pleadings that he acted maliciously and without reasonable and probable cause, but it must clearly be made out, by evidence, that the officer so acted.

Therefore, in an action against a Ponghulu for assault and false imprisonment, although it was clearly proved by the plaintiff that he was assaulted and imprisoned, and that the defendant in so acting against him, had no reasonable or probable cause, yet, as no actual malice on the part of the Ponghulu was shewn, the defendant had judgment with costs.

This was an action for assault and false imprisonment. The plaintiff was a trader at Nebong Tebal in Province Wellesley. The defendant was the Ponghulu, or Chief Police Officer, of that district. The plaintiff was suspected, though without any real foundation therefor, of smuggling opium; whereupon the Superintendent of Police in Province Wellesley wrote to the defendant a letter to take plaintiff into custody. The defendant accordingly did so, but afterwards, by orders of his said superior officer, released him. This was the trespass complained of. The defendant pleaded the general issue, relying on section 29 of the Police Act 48 of 1860.

Bond for plaintiff.

D. Logan [*Solicitor-General*] for defendant.

Cur. Adv. Vult.

April 24. Hackett, J.—This is an action to recover damages for an assault and false imprisonment. The assault and imprisonment were clearly proved. But the question is, was the defendant justified by Statute. The defendant relied on a letter he had received from his superior officer, and on the 29th section of Act 48 of 1860—but, as far as the letter is concerned, that can afford no justification. The principal part of section 29 of Act 48 of 1860, and on which the defendant relies, is in the following words: "and in every such action, it shall be expressly

[a] See judgment in this case, *infra*, p. 277.

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"alleged in the plaint that the act complained of was done maliciously and without reasonable or probable cause, and if at the trial of any such action, upon the general issue being pleaded as hereinafter provided, the plaintiff shall fail to prove such allegation, he shall be nonsuited, and a verdict shall be given for the defendant."

Now, in this case I must confess there was no "reasonable cause," but I also think that the act was not done "maliciously." I think that the letter to the defendant from his superior officer is an answer to the charge of malice. The defendant felt himself bound by his superior's orders, and was not acting of his own accord. These words are not in Act XIII. of 1856 or any of the English Statutes. The only protection the constables and those acting under the Act had, by that Act, was the notice therein mentioned; but the protection afforded under section 29 of Act 48 of 1860 is more extensive. [a] The acting "maliciously and without reasonable or probable cause," must be clearly proved, and it cannot be presumed on the evidence brought forward by the plaintiff.

Judgment for defendant with costs. [b]

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In a case of *scire facias* to revive a judgment, it is too premature and irregular to arrest the defendant before the time allowed by the *scire facias* to shew cause, has expired, and the defendant will be discharged from custody. If judgment is recovered against two, and one shortly after, is adjudicated insolvent, and the judgment is thereafter sought to be revived, the *scire facias* need not issue against the insolvent judgment-debtor, but only against the other.

Semble. If the rule, in a motion to set aside proceedings for irregularity, is made absolute, and nothing is said about costs in the motion paper, costs will not be allowed.

Query.—Do the rules of Court in England and the Statute 13 Edw. I., c. 45 [West 2], extend here? [c]

In this case, a *scire facias* to revive a judgment, and a *writ of arrest* were issued against the first defendant.

C. W. Rodyk having obtained a rule to shew cause why they should not be set aside for irregularity, and for certain defects appearing in the affidavit on which they were granted,

D. Logan [Solicitor-General] now shewed cause. The 2nd paragraph of the affidavit on which the rule was granted, I submit, is bad. The Indian Act of Limitation gives 12 years.

[Hackett, J.—The judgment is revived by Statute of West 2 [13 Edw. I., c. 45] and not by the common law.]

I submit that that Statute is applicable here; it has always been acted on both here and at Singapore. However, the judgment is revived in time by the 19th section of Act XIV. of 1859 [the Indian Act of Limitation]. That section states "no proceed-

[a] Section 29 has been repealed and re-enacted by section 47, Ordinance I of 1872.

[b] Also see *Thebbut v. Holt*, 1 Car. & R. 232; *Schiebel v. Fairbairn*, 1 B & P. 392; *Lewis v. Morris*, 2 C. & M. 712; *Smith v. Eggington*, 7 A. & E. 167; *Crozer v. Pilling*, 4 B. & C. 26; 2 Pearson on Pl. 584; *Butley v. Bethume*, 5 Taunt, 580 Broom's Com. 672, 725-32; *Mitchell v. Jenkins*, 5 B. & Ad., 583.

[c] See *Bemben v. Curpen Keechee*, 18th June, 1872, *infra*.

ings shall be taken to enforce any judgment, decree, or order of any Court established by Royal Charter, but within 12 years next after a present right to enforce the same shall have accrued to some persons capable of releasing the same, unless in the meantime such judgment, decree, or order shall have been duly revived, or some part of the principal money secured by such judgment, decree, or order, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in any such case, no proceedings shall be brought to enforce the said judgment, decree, or order, but within 12 years after such revivor, payment, or acknowledgment, or the latest of such revivors, payments, or acknowledgments, as the case may be," &c., &c. The plaintiff's affidavit shews that part of the money was paid. The *scire facias* is nothing more than a proceeding to revive the judgment. The 3rd paragraph states an objection that the names of both deponents should have appeared in the jurat, and that they were severally sworn. This objection would have been fatal in England, but not here, and the cases on this point, such as *Pardoe v. Ferrett*, 5 M. & G. 291, and *Cobbett v. Oldfield*, 16 M. & W. 469, are no authorities, as they were decided solely on the rules of Court, and there are no such rules here. The 5th paragraph states that it should appear that the affidavit was explained: this objection is untenable, as there is a memorandum in the affidavit that the same was explained. The 6th paragraph states that the judgment being recovered in the Court of Judicature cannot be revived in this Court. By the Charter and Ordinance, the cases in the late Court are to be considered as pending in this Court. *Tidd's Practice*, p. 1105, is a complete answer to this objection. The remaining objections are immaterial.

C. W. Rodyk, in support of the rule. The judgment ought to have been revived within a year and a day. Such is the practice of this Court.

[*Hackett, J.*—How do you explain the Statute of West 2?]

In Chitty's *Arch. Q. B. Prac.* 1113 [14th ed.] it is stated that the judgment must be revived within a year and a day. [a]

[*Hackett, J.*—That is at common law. The Statute 13 Edw. I, enacts "that all matters inrolled, to which the Court can give effect, shall have such force, that it shall no longer be necessary to implead upon them; but if the plaintiff come into the Court within a year, he shall have execution forthwith; or if he come after the year, a *scire facias* is to issue to warn the defendant to appear and to shew cause why the said matters inrolled should not be executed; and if he shew no cause, or if he do not appear, then the Sheriff shall be commanded to cause the said matters inrolled to be executed," thereby giving the *scire facias*.]

That Statute does not apply to this Colony. It has always been the practice of this Court to state the names of the defend-

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[a] See *Williams' Personal Property*, p. 94.

HACKETT, J. ants in the jurat, and that they were severally sworn. The rules as to affidavits are very strict. The cases that the other side anticipated I would cite, as well as *Houlden v. Fassen*, 6 Bing. 236, are applicable.

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[*Hackett, J.*—All those cases turned on the rules of Court.] I submit that the practice of this Court is the same. Then there are divers interlineations in the body as well as in the jurat of the affidavit, which make the whole affidavit void, and therefore it cannot be read. *In re Worthington*, 5 C. B. 511; *re Page*, 5 D. & L. 475; *re Fagan*, 5 C. B. 436; *Williams v. Clough*, 1 Ad. & E. 376; *Chambers v. Barnard*, 9 Dowl. 557. The affidavit also ought to have been explained; the memorandum therein is insufficient; it is not signed by the Chinese Interpreter [a]. The judgment cannot be revived in this Court, and the cases cited by the other side are inapplicable. The plaintiff should have brought an action in this Court on the judgment of the Court of Judicature [2 Saunders, 72d.]

[*Hackett, J.*—Supposing judgment was recovered in an action a day before the Supreme Court Ordinance came into operation, would the plaintiff have to go to all the expense of bringing an action on that judgment?]

Yes, there is no help for it. Then the *scire facias* itself is bad. The judgment was against two, and the *scire facias* should have been issued against both; and issuing it only against one makes it bad. [*Panton v. Hall*, 2 Salk. 597]. The insolvent could then plead that he was an insolvent.

[*Hackett, J.*—Why should the plaintiff go to such expense?] Because the debt is a just one. A *scire facias* is not amendable, *Baynes v. Forrest*, 2 Strange 892; *Vavasor v. Baile*, 1 Salk. 52. Lastly, the defendant, Chow Ah Piang, the joint contractor of the plaintiff, having been adjudicated an insolvent, the debt against the defendant, Chin Kim Fat, is extinguished [*King and another v. Hoare*, 14 L. J. Ex. [N. S.] 29] [b].

Logan in reply. The *scire facias* is good [*Tidd's Prac.* p. 934].

[*Hackett, J.*—That does not apply; the proceedings there mentioned are before final judgment.]

If the Court decides against me, then the only question is about costs, and I submit as the motion is not for costs, none can be given [2 *Arch. Q. B. Prac.* 277 [c]].

[*Hackett, J.*—Is not the arrest too premature and irregular? The *scire facias* commands him to shew cause in five days; the judgment is not revived until then, and can the defendant then be arrested now?]

The arrest is not in execution, but only to hold him to bail [d]; it is only as a security.

Hackett, J.—No, the order expressly states it is under the 4th section of the Debtors' Ordinance 22 of 1870, which relates to

[a] But see *Margetti v. Touffroy*, 1 Dowl. 41.

[b] Also see *ex-parte Higgins*, 27 L. J., Q. B. 27, and *Phillips v. Ward*, 32 L. J. Ex. 7.

[c] See *Rez v. Sheriff of Middlesex*, 2 Dowl. 5.

[d] If the arrest was only to hold him to bail, then even it would be bad [see *Aggasiz v. Palmer*, 1 D. & L. 18].

arrest after judgment only. I think the arrest is too premature and must be set aside for irregularity, but I think the *scire facias* is good. In the case of *Panton v. Hall* there were two writs of *scire facias*, and this was held bad as it was like two actions instead of one. If a judgment is recovered against two jointly, and one dies before execution, and before judgment is revived, the *scire facias* is issued only against the survivor, and not against him and the representatives of the deceased; so by analogy I think the one being adjudicated an insolvent, is in the eye of the law the same as his dying, and the *scire facias* only issues against the other. [a]

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Rule absolute, without costs. [b]

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Dedication, so as to constitute a public right-of-way, will not be presumed, unless the facts of the case are such as to show that the owner of the soil intended to do so. User alone, for however long a period, is not conclusive on the point; it may be rebutted by shewing that the state of the title was such that dedication was impossible, or by facts shewing that the owner had no such intention.

A landing-place from the seaside to a highway, is *prima facie* also a highway; but the presumption is not absolutely necessary, and may be rebutted as above stated.

Trustees of land for a special purpose have no power to dedicate it as a highway.

A private right-of-way over land granted for a special purpose, will be presumed after user for several years, where its user as a private right-of-way, would not be inconsistent with the purposes for which the land was granted.

The formation and constitution of the municipal body, considered.

This was an action of trespass. The facts and arguments are fully set forth in the judgment. The case was heard on the 12th to 15th, 18th to 23rd, 25th and 26th April, and on this day.

B. Rodyk for plaintiffs.

Bond for defendant.

Cur. Adv. Vult.

June 8. *Hackett, J.*—The plaintiffs in the present action are the Municipal Commissioners of Prince of Wales' Island and the defendant is the manager of the firm of Messrs. Lorrain, Gillespie and Co., merchants of Penang.

The action has sprung out of disputes which have arisen between the plaintiffs and the defendant, in respect of the right to use a place called Church Street Ghaut, a passage running from Beach Street to the sea and bounding the premises used by Messrs. Lorrain, Gillespie and Co., the defendant contending that this ghaut is a public highway, and that he has therefore the right to open gates into it in any part of the adjacent premises,

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[a] But see *Cocks v. Bremer*, 11 M. & W. 51; *Farder v. Kikerley*, 2 M. & G. 760, s.c. 3 Sc. N. R. 139.

[b] See further as to the arrest being premature, *Alston v. Underhill*, 2 Dowl 26.

HACKETT, J. and the plaintiffs denying that the ghaut is a public highway or that the defendant has the right contended for.
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The action is one of trespass, breaking and entering a close of the plaintiffs' called Church Street Ghaut, situate in George Town, Penang, and for taking up, breaking down, and removing two boards of the plaintiffs, fixed to the said close, for which trespasses the plaintiffs claim \$100 damages. The defendant has pleaded, first, not guilty; secondly, not possessed; thirdly, a plea of the public highway. The fourth plea has been held bad on demurrer [a], and the fifth plea claims private right-of-way by non-existing grants over the close in question.

About the two first pleas there is no difficulty; it is clear that the trespass was committed by the defendant's orders, and there must therefore be judgment for the plaintiffs upon that plea, nor do I think that there is any doubt that the plaintiffs have established a sufficient title to enable them to sustain this action against a wrongdoer. Trespass is founded upon possession, *Graham v. Peat*, 1 East 243, 246; *Lee v. Stevenson*, E. B. & E., 512, and the party in possession will make out a *prima facie* case sufficient to entitle him to a verdict by proof of such possession in himself and of entry by the defendant. There must therefore be judgment for the plaintiffs in the second plea also. Then we come to the third plea, which is as follows: "The defendant says that at the time of the alleged trespass there was, and of right ought to have been, a certain common and public highway into, through, over, and along the said close for all persons to return, pass, and repass on foot and with horses and other cattle and with carriages at all times of the year at their free will and pleasure. Wherefore the defendant having occasion to use and using the said way, because the said boards or fences had been and were wrongfully erected across the said highway and obstructed the same, pulled down the said boards or fences which are the trespasses alleged."

The plaintiffs have taken issue on this plea, and I have therefore to decide whether upon the evidence, Church Street Ghaut is or is not a highway, as alleged by the defendant. Highway is said to be the genus of all public ways, of which Lord Coke says there are three kinds, a footway, a foot and a horse way, and a foot, horse, and cart way, *Co. Litt.* 56 a. Mr. Smith [2 L. C. 136] defines it as "a passage open to all the king's subjects," as it is clear that every passage which is open *de jure* to all the king's subjects must be a highway. The present plea claims a right of passage of the most extensive kind for persons on foot and for horses and other cattle and for carriages.

A way is usually constituted a public highway by a dedication of it by the owner of the soil to the public use. And this dedication may be presumed from circumstances. Thus, where the owner of the soil suffered the public to have the free passage of a street in London, though not a thoroughfare, for eight years without any impediment, it was held a sufficient, for presuming, derelection to the public, *Trustees of Rugby Charity v. Merry-*

[a] See ante p. 272.

weather, 11 *East* 375. So, where a street communicating with a public road at each end had been used as a public road for four or five years, it was held the jury must presume a dedication *James v. Dean*, 3 *Bing*, 447; see *per Mansfield C. J., Woodyer v. Hadden*, 5 *Taunt.* 125.

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The defendant's case rests principally upon evidence of user, and it is contended on his behalf that from the uninterrupted user of the ghaut for the last sixty or seventy years, it must be presumed that it was dedicated to the public as a highway.

The plaintiffs on the other hand, contended that the title and history of the ghaut explain the user, and rebut the inference which is sought to be drawn from it. They submit that in every case the facts must be such as are sufficient to shew, that the owner meant to give the public a right-of-way over his soil before a dedication by him will be presumed.

Has there then been in the present case, user by the public for a sufficient length of time of the close in question as a public highway from which a dedication on the part of the owner, whoever he may be, is to be inferred? and secondly, was the state of the property and the title such as to make such a dedication possible? A great quantity of evidence, both documentary and oral, has been adduced by both sides in order to sustain their respective views, and I will now deal with the facts so far as they appear to be material to the present question.

In the year 1800, it became manifest to the Local Government of Prince of Wales' Island, that it was necessary to establish an organization for the purpose of laying out and keeping the town in order, and accordingly, at the suggestion of the then Lieutenant-Governor, Sir George Leith, the principal European and native inhabitants of the town met, and elected a Committee, which was to levy assessments for the purpose of raising streets, and making drains in the new town, which Committee was to be presided over by a Government officer to be named by the then Lieutenant-Governor. This Committee was aided in its efforts by the Government, which gave money and land to assist them in carrying out their views. At a meeting of the Committee held on the 4th January 1801, estimates were proposed for making streets and drains, and it was also proposed that a ghaut should be made opposite to the street leading out of Beach Street. It is important to bear in mind that at this time the land on the seaward side of Beach Street, was still unappropriated, and was called a mud bank, and one of the objects of the Committee seems to have been to have this mud bank covered with "puckka godowns." The Committee therefore asked the Government for permission to sell this land, reserving sufficient space for the markets. The Government having given the necessary permission, it appears from the records of the Municipality that the mud bank to the eastward of Beach Street was put up for auction, in lots, and sold in the month of February 1801. The land upon which the godowns of Messrs. Lorrain Gillespie and Co., stand, was purchased by a Mr. Perkins, as well as the ground which now forms Church Street Ghaut. But on the 30th March subsequently, the ground now form-

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ing Church Street Ghaut, was repurchased by the Committee from Mr. Perkins for the purpose of making it into a ghaut opposite to Church Street. At the same meeting of the Committee when the Church Street Ghaut was repurchased, it was resolved that a wall three feet wide and three feet high should be made between the ghaut and the adjoining ground as soon as possible.

It is important to recollect that at this time [1801], the town of George Town, properly so called, was not yet actually in existence. It existed in great measure only on paper, in the designs of the Surveyors. That which is now the eastern side of Beach Street, a line of shops and godowns filled with merchandize, was only an unsightly bank of mud, unavailable for any useful purpose until it should be filled in and reclaimed. The ghauts, or at least many of them, existed only in name, and the streets to the west of Beach Street were still in process of formation. This is clear from a resolution of the Committee of Assessors of the 30th August, 1801: "That the Company's convicts be ordered to finish "Bishop Street and Church Street, after which Mr. Brown be "allowed 30, and that the remainder of the convicts be employed "upon the ghauts;" and on the 28th September following, we find the Committee approving of a contract for filling up the Chulia Street Ghaut. On the 23rd November, 1801, it was agreed that two hundred and fifty dollars be paid for filling up the Prison Ghaut, and on the same day it was resolved that a wall should be made between the ghaut at the end of Church Street and Captain Farquharson's premises, one half to be paid by the Commissioners and the other half by Captain Farquharson's agents. It may be remarked that in the grant of the Church Street Ghaut, it is described as being bounded on the south by Captain Farquharson's land, which would be the site of Messrs. Lorrain, Gillespie and Co's godowns.

To proceed with the history of Church Street Ghaut, we find the Committee of Assessors in their meeting of the 25th June, 1802, requesting that an application should be made to the Government for grants to the public of the landed property belonging to them in George Town, and that the grants be made in the "names of the public at large, them and their administrators in succession." In accordance with this request, on the 2nd October, 1802, the Lieutenant-Governor issued grants of the land which had been reserved for the purpose, to the inhabitants of George Town, to them and their representatives in perpetuity. The grant of the Church Street Ghaut has been produced, from which I take the following details. George Town is described by the following boundaries: "From the north-east angle of the point extending along the sea beach to the westward of the Penang Road, "and including all grounds beyond the Penang Road which enter "immediately upon it. From the beach in a southerly direction "to the first bridge, from thence following the northern bank of "the Prangin in an easterly direction to the sea, and from thence "along the east side of the town to the north-east point." The grant is stated to be "for the express purpose of establishing "a revenue to be applied to the repairing streets, ghauts, and

"other public works in the said town," and the subject of the grant is described as "a piece of ground situated on the east side of Beach Street denominated Church Street Ghaut, George Town, bounded to the eastward by the sea and measuring on that side thirty-eight feet, bounded to the westward by Beach Street and measuring on that side thirty-eight feet, bounded to the northward by Messrs. Abbott and Maitland's ground and measuring on that side one hundred and thirty feet, and bounded to the southward by Captain Farquharson's ground, and measuring on that side one hundred and thirty feet, but without power to sell or dispose of the same unless required by Government."

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The grants of the other ghaut were, *mutatis mutandis*, in the same terms as that of the Church Street Ghaut.

In connection with the grants of the ghauts, it may be convenient to refer to the title-deeds of Messrs. Lorrain, Gillespie and Co., which have been put in by the defendant, and to the argument which defendant founds upon the terms of those deeds. The original grant is dated the 2nd November, 1801, eleven months before the date of the grant of the Church Street Ghaut to the inhabitants of George Town. It is a grant by the Lieutenant-Governor of Prince of Wales' Island, to the executors of Mr. John Perkins, and it describes the ground as bounded to the northward by Church Street Ghaut, and measuring on that side eighty-five feet.

Upon this description Mr. Bond has founded the argument that, at the time of the grant, Church Street Ghaut was already in existence, and had probably been in existence for some time, and that the natural inference is, that it had been previously used as a public ghaut or means of access to the sea, and consequently that it had been dedicated to the public as a highway, and was in effect a highway, at the time the grant was made [2nd November, 1801].

Much stress has been laid on the word ghaut as shewing that the place was for the use of the public. The word ghaut or ghat is, I believe, Hindustani, and whatever its literal meaning may be [in one dictionary I see it defined as "an entrance to a country"], it seems to be used here and in Calcutta, to mean a landing-place. Now I quite agree that *prima facie* there is some reason to think that a landing-place leading from the sea to a public highway, would be also a highway; but I do not think that the inference is absolutely necessary, and I think that it might be rebutted by evidence shewing that it could not have been dedicated as a highway, or that it was in fact not so dedicated.

In the present case, it is clear from the documentary evidence, that in the year 1801, the town was only in process of formation; the streets and drains were designed, but were not yet made, and the bank to the eastward of Beach Street was not yet filled in; and as to the Church Street Ghaut, up to the 30th March, 1801 it formed a portion of the land purchased from Government by Mr. Perkins, and then repurchased from him by the Committee of Assessors, so that it is clear that any presumption that it had

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We have now arrived at the period when the land on which George Town stands, which had been up to that time vested in the Local Government, was transferred by them to the persons who had purchased from the Committee of Assessors. The Committee of Assessors were appointed by the people, with the exception of the Chairman who was nominated by the Government, and to this Committee the Government entrusted power to lay out the town in the manner most suitable to the requirements of the inhabitants. With this object in view, the Committee were authorized to form streets, to sell the adjacent lands in lots, and to establish a system of drainage. The Government also consented to make the inhabitants of the town a present of certain reserved lots adjacent to the sea, which were called ghauts, and which we may therefore suppose were intended to afford the inhabitants of the town access to the sea at several different points in the town. It seems to have been thought desirable wherever Beach Street was crossed by a principal street, that there should be a ghaut which should afford a direct approach to the water. This, I think, appears clearly from the original plan of the town referred to in the Municipal documents, in which the ghauts are called the public ghauts.

It appears from what I have said, that the Government land which now forms George Town was dealt with in these different ways by the Committee of Assessors with the consent of the Government. First, the streets were laid out and implicitly dedicated to the public; then there was the land which was allotted to purchasers who obtained grants from the Government; and lastly there were the lots reserved by the Committee of Assessors for the use of the inhabitants of George Town, and called public ghauts, for which also grants were issued by the Government.

It has been argued by Mr. Bond that these public ghauts, as they were called, could have been only ghauts for the use of the public, and therefore highways. But it appears to me that although the ghauts were clearly intended for the benefit of the inhabitants of George Town, it does not follow that they were on that account to be regarded as highways of the same nature as the streets of the town. The history of the formation of the town shews that the ghauts were regarded as something different from the streets. The streets were laid out and designated by the name of streets, and dedication was presumed. If it had been intended to constitute the ghauts into mere highways, nothing would have been simpler than to have mapped them out and called them by the names of streets or lanes or ghauts, and the dedication would have been presumed.

But here we have first a reservation of certain lots, afterwards called ghauts, and then a formal grant of these ghauts to the inhabitants of George Town for certain special purposes.

I think therefore that it appears from the way in which these ghauts were originally created, that although they were undoubtedly formed for the benefit of the inhabitants, partly no doubt to afford them easy access to the sea, that they were not

intended to be merely highways or streets. The terms of the ghauts themselves leave no doubt upon that point.

The object of the grant is expressly for the purpose of raising a revenue to be applied to the repairing streets, ghauts, or other public works in the said town, an object quite inconsistent with their dedication as highways in the ordinary sense of the word. It may be quite true, and probably was the case, that the ghauts were intended as passages to the sea; but if they were once dedicated to the public as highways in the ordinary sense, and in the only sense which can benefit the defendant, it would clearly be utterly impossible to raise revenues from them in any way: no mode of raising a revenue could be derived which would not amount to an obstruction in the case of a highway.

The truth seems to be that it was thought that the assessments necessary for the making of the streets, drains, and other public works of the newly-formed town would press heavily on the people, and the ghauts were granted to the inhabitants in order to relieve them from excessive assessments. And it appears from the records of the Municipality, that from the commencement, the Committee proceeded to utilize some of the ghauts by erecting rice bazaars and other markets on them; but there is no evidence that Church Street Ghaut was used in the same way, or that any revenue was derived from it until many years afterwards. I find, however, in the early records, valuations of the property of the Committee of Assessors, in which the ghauts are valued as forming part of the assets of the Committee. There is one of the 31st December 1802, in which Church Street Ghaut is put down as worth \$500.

In April, 1806, I find another valuation, in which Church Street Ghaut is put down as worth \$1,000.

Some of the ghauts continued to be rented down to [according to the municipal documents] the year 1836 or 1837, but they do not appear to have yielded an increasing revenue, as I find that in the assessors' accounts for the year 1814, they are represented as producing only \$104 a year, being less than the rents obtained in the first years after their formation. It is clear therefore, whatever the cause may have been, that in the earlier days of the history of George Town, the ghauts were by no means a profitable property for the inhabitants, and did not go far to realize the objects for which they were created.

I will now consider the evidence of user upon which Mr. Bond relies, as raising the presumption of the dedication of Church Street Ghaut as a highway.

The evidence on this point is not so old as the documentary evidence, and does not extend further than about the year 1810. Mr. Ibbetson, who was formerly Governor of the Settlements, recollects Church Street in the year 1810, when the Government Offices ghaut, were placed in the premises occupied by Messrs. Lorrain, Gillespie and Co. According to his evidence, the ghaut was then used as a thoroughfare by the public, and there was no obstruction to such user. He does not recollect that the ghauts were under any control.

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Then we have the evidence of Mr. Rodyk, who was in the employment of the Government in the year 1809, and remembers Church Street Ghaut. According to his evidence, the Church Street Ghaut was in a very bad state of repair. It was, he says, muddy. Boats used to come alongside the ghaut and land their goods. There was a small thannah [police station] in each ghaut to prevent gambling. He always knew the ghauts to be used as public thoroughfares and has seen carts going down the ghauts.

Mr. W. Lewis, formerly Resident Councillor at Penang, and residing here ever since 1826, has known the ghauts ever since his arrival, as public thoroughfares. He states that in his time they were never let. On cross-examination he stated that he recollected the Church Street Ghaut being made use of as a sort of police compound; that there were always large quantities of bricks and firewood in the Church Street Ghaut.

Mr. Nairne, a resident in Penang since 1834, who has godowns adjacent to Church Street Ghaut, states that he has always known Church Street Ghaut to be used as a thoroughfare for landing and shipping goods, that he has seen carts go up and down, and that he never knew of any obstruction. On cross-examination, he stated the ghauts have been let out for different purposes, that he was a Municipal Commissioner from 1855 to 1859, and that during that period Church Street Ghaut was let out, subject to a right-of-way for people in the middle, that the sides of the Church Street Ghaut have been constantly obstructed by bricks being placed against his wall, that he remonstrated against the obstruction, that he had one gate opening on the ghaut, and that he wished to open another lower down, but that he had no right.

Mr. Magness, formerly Inspector of Police, recollects the Church Street Ghaut since 1847. He states that he has seen people and carts go up down the ghaut without any obstruction, and also that he has seen bricks piled up in the ghaut opposite to the defendant's godown; that he considered the ghaut a thoroughfare, as he had constantly seen people going up and down.

Mahomed Hashim, a native clerk in the employ of the Municipality, states that he remembers when the municipal office was in the building adjoining Church Street Ghaut, in Mr. Mitchell's time [previous to 1849]; that he recollects collecting rents for Church Street Ghaut for bricks, boats, and firewood stored there; that carriages and carts used to be registered in the ghaut; that people were in the habit of using the ghaut as a thoroughfare.

Mr. W. Padday, a resident of Penang for the last twenty-six years, states he has always known Church Street Ghaut to be a thoroughfare.

Mr. Vappoo Noordin, a native of Penang, and a Municipal Commissioner, about forty years of age, states that as long as he can recollect, the ghauts have been used as public thoroughfares for carts as well as for foot passengers.

Mr. Raphael Jeremiah recollects Church Street Ghaut for more than fifty years. He states that the ghauts were used by the public for landing goods and as public thoroughfares; and

that there used formerly to be a watchman's box in each ghaut; he states that in rainy weather, the ghauts were muddy, and that it was difficult to pass through them at such times.

Abdul Wahid was in the employment of the Committee of Assessors forty years ago, and knew the Church Street Ghaut well. He states that, as long as he can recollect, goods have been landed at the ghauts, and people used to go up and down the ghaut at pleasure. He stated that the custom-house was in Messrs. Lorrain, Gillespie and Co.'s premises, and that goods were landed at the ghauts and taken through the custom-house.

Hoosainsa, a Government pensioner, remembers Messrs. Lorrain, Gillespie and Co.'s premises more than thirty years ago, when the custom-house was there [this was in 1816]. He states, that during his time in Penang, the ghauts were always used for landing goods and as a public thoroughfare.

Chin Ah Heng, a carpenter, states that for the past twenty years he has been in the habit of getting his wood from the sea-side over Church Street Ghaut, and that he has never been interfered with in so doing. This witness called the ghaut by the name of lane. He stated in cross-examination, that he was in the habit of carrying his timber through the centre of the ghaut, and that as long as he could recollect there were bricks and stones on the sides of the ghaut.

Heap Keat and Mr. Gentle gave evidence of the user of Market Street and China Street Ghauts.

Mr. M. A. Anthony stated that the China Street Ghaut has always been used in the same way as any of the streets, and that it was a regular stand for buffalo carts. In cross-examination he stated that the ghauts were kept in very bad order.

Lim Sim Kay, a Chinese merchant, stated that he knew the ghauts for the last thirty years, that they were used as public thoroughfares, but that they were much neglected.

Ibrahim, a timber merchant in Rope Walk, states that he has stored timber in the Chulia Street Ghaut ever since 1825; that he has seen carts going up and down the ghauts, and goods landed and shipped, and that they were used as public thoroughfares. He afterwards said that there was a dispute about his placing timber in the ghaut, and he got permission to do so; that it was decided that he might leave the timber on the ghaut until it should be carted away.

Mr. Herriot, one of the Municipal Commissioners, a resident in Penang for thirty-four years, gave evidence as to the user of the ghauts generally, but stated that they were never repaired in the same way as the streets or roads.

Ong Ah Thye, spirit farmer, was in the habit of importing molasses from Province Wellesley, and used the Church Street Ghaut for a landing-place for twenty years past.

Ong Choon Swee, an importer of rice, has known Church Street Ghaut to be used as a thoroughfare as long as he can remember [he is now fifty-two].

Several other Chinese merchants testified to the general uses of the ghauts for landing and shipping goods, for the last thirty

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Mr. Peel, the Government Surveyor, gave evidence as to the present state of the ghauts. All the ghauts would seem to be obstructed in various ways, some by wood, stones, and bricks, some by boats, and many of them by buildings. None of them seem to be free of obstructions of some sort, such as in a highway would be deemed nuisances. He describes St. George's Ghaut as being encumbered with pipes, boats, carts, wood, planters' firewood, some sheds, and in the lower part, an open drain. All the ghauts, St. George's Ghaut included, are described as being in a dirty state.

Mr. Eagleshame, the acting Secretary to the Municipal Commissioners, states that the ghauts were used for storing various articles, such as timber, firewood, brick, and lime.

Mr. Presgrave, Secretary to the Municipal Commissioners, states that the ghauts were rented down to 1836; but as I have already said, it does not appear from the records that Church Street Ghaut was amongst those which were rented. The witness read a resolution of a general meeting of the landholders of George Town on the 3rd July, 1805, in which there was the following recitals: "It having been taken into consideration the best mode of keeping the ghauts and streets clean and in repair, and the rents of the property belonging to the public appearing to be 1,380 dollars per annum," the resolution then went on to approve of a proposal for carrying out of the proposed works. He also read a resolution of the Assessors of the 6th August, 1805, according to which the renters of Armenian Ghaut were to be charged \$15 monthly. According to the evidence of Mr. Presgrave, the idea of raising a revenue from the ghauts seems to have been revived in 1851, when the then Committee began to think seriously of making the ghauts a valuable source of income to the town; but they seem to have been doubtful of their town powers, and the matter seems to have been discussed for some years. At length they seem to have obtained a legal opinion, and in 1859 Church Street Ghaut was rented. It does not seem however to have been the intention of the Commissioners to stop up the ghauts, and they appear all along to have believed that the public had a right of passing over the ghauts, and that they were to be rented subject to the public right of passage. Mr. Presgrave states that the ghauts were kept up in a certain measure, but that they were not repaired in the same way as the high roads. He also states that during his time [over twenty years] he has seen the ghauts constantly obstructed by bricks, timber, and other things.

We find scattered through the records of the Municipality, various notices which shew that the ghauts were not altogether neglected. On the 24th July, 1803, there is an advertisement for proposals of repairing the streets, wharves, and drains. On the 2nd November, 1809, there is a notice cautioning people against allowing stones, red earth, firewood, &c., landed at the public ghauts, to remain there more than twenty-four hours. And in

October, 1808, there is reference to the collection of the rents of ghauts in Beach Street. In August, 1801, it was proposed to the Committee of Assessors by the Government, that they should fill up and carry out the public ghaut between the custom-house and Mr. Hallyburton's premises [Church Street Ghaut]; and as it was stated to be a work which would materially benefit the public, it was agreed that the Committee should on their part carry out the puckka drains, as being a fair proportion of the expenses to be borne by them. On the 4th December, 1811, we find that Mr. R. Caunter is desired by the Committee to get the drain made in Church Street Ghaut as soon as possible, as the Government intend filling up and carrying out that ghaut as soon as the drain is completed. From the two last entries, it would appear that as late as 1811, Church Street was not yet filled in, and that the work was ultimately done by the Government. In 1813, it seems that Church Street Ghaut had been added to, as there is a complaint made by Mr. Hallyburton on the 19th February, 1813, of the damage done to his premises in consequence of the addition.

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On the 5th October, 1814, the Government wrote to the Committee of Assessors, prohibiting attap sheds being built on the public ghauts, and directing that all buildings of that description then standing should be immediately removed.

I have now mentioned the parts of the evidence which appear to me to affect the question of user. And I think that the general result may be shortly stated as follows: that ever since 1810, Church Street Ghaut, as well as the other ghauts, has been used as a thoroughfare by the public, both for carts and for foot passengers; that there was never any attempt to obstruct the public in the exercise of this user; but as far as can be judged [for the evidence of the case is necessarily somewhat vague, as it rests on the testimony of witnesses depending on their recollection of facts many years old], the ghauts were in a dirty state [Mr. Rodyk said that in 1810, Church Street Ghaut was in a very bad state, that it was mud; and Raphael Jeremiah gave evidence to the same effect] and could not have been repaired in a way the streets of a town are usually repaired, and that they were constantly encumbered by various articles, such as bricks, firewood, &c., and in many cases by sheds. It also appears from the evidence that while Market Street, Chulia Street, and Armenian Street Ghauts, were rented for various purposes, Church Street Ghaut was not rented out until 1859; at least it does not appear from the municipal records that it ever was rented until that date.

Upon this evidence, Mr. Bond contends that it must be presumed that there was a dedication of Church Street Ghaut to the public as a highway, not merely that the public had acquired a right of passing over a complete and absolute dedication of the whole soil of the ghaut, so that it could not be used for any other purpose.

Now assuming that the evidence of user, if unrebutted by other evidence, would be sufficient to raise a presumption of the

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dedication of Church Street Ghaut as a public highway, I will proceed to consider the grounds relied upon by the plaintiffs, as shewing that there was and could have been no intention of dedicating the close as a highway.

First, it is urged by the plaintiffs, that in every case the facts must be such, as are sufficient to shew that the owner meant to give the public a right of way over his soil before a dedication by him, will be presumed, and that the user is not conclusive. Thus in *Woodyer v. Hadden*, [5 Taunt. 125.] where the plaintiff erected a street leading out of a highway across his own close, and terminating at the edge of the defendant's adjoining close, which was separated by the defendant's fence from the end of the street for twenty one years, during nineteen years of which the houses were completed, and the street publicly watched, cleansed and lighted, and both footways and half the houseway paved at the expense of the inhabitants; it was held that the street was not so dedicated to the public, that the defendant pulling down his wall might enter it at the end adjoining to his land and use it as a highway. Cases were also cited to shew that nothing done by a lessee without the consent of the owner of the fee, will give a right of way to the public. Thus in *Wood v. Veal*, [5 B. & A. 454.] which was an action of trespass, &c., there was a justification under a public right of way, it appeared that the place in question, which was not a thoroughfare, had been under lease from 1719 to 1818, but had been used by the public as far back as living memory could go; and had been lighted, paved and watched under an Act of Parliament, in which it was mentioned as one of the streets of Westminster; and that the plaintiff who enclosed it after 1818, had previously lived for twenty-four years in its neighbourhood. But it was held, that even under these circumstances the jury were justified in finding that there was no public right of way, in as much as there could be no dedication to the public by the tenant for ninety years, nor by any one, except the owner of the fee.

The general principle, to be derived from the cases, seems to be that in order to constitute a valid dedication to the public, of a highway by the owner of the soil, there must be an intention to dedicate an *animus dedicandi*, of which the user by the public is evidence and no more. But it is sufficient to shew that there has been such a user by the public as satisfies the Court or jury that a dedication to the public was intended by the owner whoever he might be. In *Reg. v. East Mark*, [11. Q. B. 877], where a road had been originally set out under a private inclosure Act over part of the waste of a manor, and had been used by the public generally ever since it had been so set out, being a period of fifty years, and a portion of the waste had been allotted to the lord in respect of his interest in the soil, it was contended that the soil of the road had been taken out of the lord and transferred to no other person, and that therefore there was no owner or none against whom a dedication could be presumed, for that, there must have been an owner who knew that he was so, or his consent to the public user could not be presumed; and that if the Crown were the owner,

stronger evidence would be necessary to raise a presumption of a dedication than if the owner had been a private person. But the Court of Queen's Bench held, that a dedication might be presumed even against the Crown, from long acquiescence in public user, and that the jury were rightly directed to consider whether the owner, whoever he might be, had consented to the public user in such a manner as to satisfy the jury that he intended to dedicate a highway to the public. Lord Denman, C. J. there observed, "Enjoyment for a great length of time, ought to be sufficient evidence of dedication unless the state of the property has been such as to make dedication impossible." In *Reg. v. l'ettie*, [4 E. & B. 737] it was laid down that when there is satisfactory evidence of such user of a road, as to time, manner and circumstances, as would lead to the inference that there was a dedication by the owner of the fee, if it was shewn who he was, it is not necessary to enquire who the individual was, from whom the dedication necessarily inferred, from such user first proceeded; and when such user is proved, the *onus* lies on the person who seeks to deny the inference from it, to shew negatively that the state of the title was such that dedication was impossible, and that no one capable of dedicating existed. It is, however, to be observed, that it is not enough to establish the right of the public that the persons using the way reasonably believed from the conduct of the owner, that they acquired a right to it; an actual intention on the part of the owner to dedicate, must be shewn. The last proposition is supported by the cases of *Banacloagh v. Johnson*, 8. Ad. & E., and *Ferrand v. Milligar*, 7 Q. B. 750. On the whole, I think, the cases shew that user alone, for however lengthened a period, is not conclusive, and that it may be rebutted either by facts shewing that it was not the intention of the owner to dedicate, or by shewing that owing to the state of the title, dedication was impossible. I now come to the consideration upon which the plaintiffs' counsel mainly rested, and which may be stated thus: that Church Street Ghaut was the subject of a charitable trust, and that inasmuch as its dedication as a public highway was inconsistent with the purposes of the trust, that a dedication could not be presumed. It is said that Church Street Ghaut was granted to the inhabitants of George Town, for the express purpose of establishing a revenue for the repairs of the streets, ghauts and other public works, and that, as a dedication of the ghauts as a highway would be a breach of trust on the part of the trustees which would not be implied, and therefore that the presumption of dedication is rebutted.

It has been objected by Mr. Bond in the first place, that the grant which creates the charitable trust is void and therefore the major premises of the argument is unsound. The grant in the present case being to the inhabitants of George Town and their representatives in perpetuity, it is argued that the gift is void, inasmuch as the inhabitants of George Town are not capable of taking by grant, being unincorporated. For this position he relies upon the passage in Duke, [*Duke's Charitable Uses*, p. 134] where it is said "that a gift to a parish by deed to a charitable use is

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HACKETT, J. "void, but a devise by a will is good." It appears to me that this passage must mean that the grant is void at law, as it is laid down in *Sheppard's Touchstone*, p. 237. "If a grant be made to the parishoners of Dale [of land] it is void, and so also of a grant of land to the Church Wardens of a parish." But grants of a charitable nature have always been supported in equity, see *Duke*, p. 355. "But this we are to take as out of question, that a disposition of lands, rents, money, goods, &c., may be by act executed in a man's lifetime, or by his Will at his death to charitable uses, within the intent and purview of this Statute [Stat. 43 Eliz.]. . . . Albeit there be defect in the deed, or in the Will, either in the party trusted in the use where he is misnamed, or the like; or in the parties for whose use, &c. . . . And therefore if a copyholder doth dispose of a copyhold, but to the charitable use without a surrender, citing *Tufnel v. Page*, 2 Aik 37: and in divers such like cases, when the donor is of capacity to dispose, and hath such an estate as is any way disposable by him, this Statute shall supply all the defects of assurance," and in page 356, *Duke*, "It hath been agreed and resolved to be within the intent and purview to this Statute to order and decree the same in all the case hereafter following; that is to say where one gives land to the Church Wardens of a parish [who are by law not capable to take it by grant] to charitable uses So where land is given to repair highways to the parishoners of Dale." It appears, therefore, from the passages in *Duke* last cited, that when there is a defect in the assurance, creating the trust from such a cause as the grantee being incapable of taking, that a Court of Equity will step in and aid the defect in favor of the charity. The question arose in the case of *Christ's College, Cambridge*, 1 Wm. Blackst. 90. In that case it appeared that Mr. Tancred by deed, conveyed his estate to Geofoees, to the use of himself for life, remainder to his first and other sons in tail, remainder to certain officers of Christ's College, to maintain certain students there in the sciences of physic and divinity, and four students of law at Lincoln's Inn. By his Will he confirmed the deed, but fearing the Statute of Mortmain might defeat it, he ordered in case the said uses or any of them should be contrary to law, the estates so settled should go to other objects. On an information by the Attorney-General to establish this charity, there arose two questions: the first of which was, whether this was a conveyance to charitable uses under the Statute Eliz. and therefore to be aided by the Court of Chancery. Lord Henley [then Lord Keeper] said, "The conveyance is admitted to be defective, the use being limited to certain officers of the corporation and not to the corporate body; and therefore there is a want of persons to take in perpetual succession. The only doubt is, whether the Court should supply this defect for the benefit of the charity under the Statute of Elizabeth. And I take the uniform rule of this Court before and after the Statute of Elizabeth, to have been, that where the uses are charitable, and the person has in himself full power to convey, the Court will aid a defective conveyance to such uses."

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I think there can be no doubt the purpose for which Church Street Ghaut was granted, constituted a good charitable trust, [see *Atty.-Genl. v. Heclis*, 2 S. & St. 76 ; *Visct. Girt. v. Atty.-Genl.*, 6 Dowl. 136], and therefore that the defect in the grant would be aided by a Court of Equity. For this reason, I think that Mr. Bond's objection, although valid as regards the legal effect of the grant, does not affect the charitable trust which must be held to attach to the land.

Church Street Ghaut therefore, having been, according to this view, granted to the inhabitants of George Town for charitable purposes, had the trustees or whoever were in possession of the land, power to dedicate it to the public as a highway?

It appears from the history of the Municipality that by the desire of the Government, the people of the town elected a certain members of representatives called the Committee of Assessors to whom was entrusted the care of the town in all matters concerning the drainage, the making and repairing of streets, and all similar matters. The Committee of Assessors was also authorized to assess the inhabitants for public purposes, and it exercised a general control over the town, and amongst its other charges it seems to have had charge of the ghauts. Indeed, it was on the application of this Committee that the Government granted out the ghauts and the other lots in the town. This body was not incorporated and was therefore incapable of taking by grant. It was originally a purely voluntary body, at least I have not seen any law or regulation recognizing its existence. I believe there was a Regulation of the Government in Council on the subject in 1827, but I have not had an opportunity of seeing it. Then came Act XII. of 1839, which authorized the Chief Civil Officer of the Settlement to make assessments to a certain amount, and to appoint officers to collect such assessments. And the next important Act on the subject was, Act IX. of 1840, which also provided for the assessment of the town and for the watching, repairing and lighting the roads, streets, &c. This Act also directed the Civil Authority of the Settlement to appoint a Municipal Committee to make order for the performance of the Act and empowered it to make rules and regulations. But this Committee was not incorporated and no property was vested in it. Then came Act XIX. of 1856, which vested in the Municipal Commissioners all property, however, acquired by the Commissioners, &c., and then vested in them or any other persons in trust for them, to be held by them as Trustees for the purpose of the Act. But it was not until Act XXVII. of 1856, that the Municipal Commissioners were constituted into a corporation with perpetual succession and a right to sue and be sued. It is clear that they would not previously to their incorporation, have acquired their right to property, except in their individual capacity. It is probable therefore that the legal estate in the ghauts remained in the E. I. Company, the grantors, down to 1856, subject of course to the trust which they had themselves created. The Committee of Assessors or Municipal Committee or by whatever names these different bodies may be designated, may be regarded as the agents,

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acting for and on behalf of the trustees of the charity. Assuming then, that they were to all intents and purposes, as far as the ghauts were concerned, the agents of the trustees, had they or their principals power to dedicate the ghauts to the public as highways? Mr. Bond urges that they had, and cites the *Rugby Charity case*, 11 East, 375. But that case is very shortly reported in a note, and the facts do not appear, and I may remark, that Parke J. observed in *Rex v. Leake*, 5 B. & Ad. 469, that "the Trustees in the *Rugby case* were only trustees as to profits and that they acted as ordinary owners." Mr. Bond also referred to *Surrey Canal Co. v. Hall*, 1 M. & G. 392. But that was a dedication by a Canal Company which stands in a different footing from trustees for public purposes, as they are masters of their own property. As was said in that case, though they may be answerable to the rest of the proprietors for failure of duty, there is no reason why the public may not by use, gain a right as against them, as well as against any other individuals. Mr. Bond then urged, that although the ghauts were granted to the town for the express purpose of establishing a revenue, yet that as the mode of raising the revenue was not pointed out, it did not necessarily follow that the revenue was to be raised directly from the ghauts themselves, and that it might well be, that it was contemplated that the user of the ghauts as highways, would enhance the value of the adjacent property, and by increasing its rateable value would thus indirectly enlarge the revenue. But although this construction is ingenious, I confess, I am unable to read the grants in this way. It appears to me that the words, "for the express purpose of establishing a revenue," means, that the revenue was to be raised out of the ground itself and not indirectly out of some other piece of ground whose value might possibly be increased by using the ghauts as a highway. I think in construing the meaning of the words "establishing a revenue" we should regard the ghauts as the proximate and not the remote cause of the revenue to be raised, and it appears to me clear, from the words of the grant, that the intention was, that the ghauts should be made use for the express purpose of raising a revenue in aid of the town. How that revenue was to be raised was not stated. That was left to the discretion of the town people themselves, and as has been seen in the earlier days of the history of the town, a revenue was raised from the markets and shops which were established in some of the ghauts. Not indeed in Church Street Ghaut, but although this ghaut was not made use of for any purposes of profit, I think the original trust still clings to it, and that the Committee of Assessors or the Municipal Committee or whoever were the persons acting as or on behalf of the trustees, were bound by the original trust. The duties of trustees for public purposes, and their right to dedicate property entrusted to them, to the public as a highway, was discussed in the case of the *King v. Leare*, 5 B. & Ad. 469. In that case the Commissioners for drainage being authorized by an Act to make drains and dispose of the earth in forming banks on the sides thereof, made a drain, and with the earth taken from it, made a

bank on one side of it, which had been used for twenty-five years as a public highway; it not appearing that the cleaning of the drains or any other purpose of the Act, had been or was likely to be interfered with by any such user of the soil, it was held that a dedication might be made by the Commissioners upon the case. It is necessary to be observed that the question decided was mainly one of fact, the law on the subject being clearly laid down by Parke, J. as follows: "If the land were vested by the Act of Parliament in Commissioners so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear, that the Commissioners have that power." But the learned Judge after carefully considering the duties imposed on the Commissioners by the Act of Parliament, came to the conclusion that there was nothing inconsistent with those duties in the dedication of the land to the public as a highway. Mr. Justice Littledale, however, differed in opinion with the rest of the Court, and his remarks are worth citing. He said, "certain powers are given to the Commissioners to deal with the land mentioned in the Act in the manner there prescribed, and under their power they have made a bank which is subservient to the purpose of the drainage. Over a part of this bank the road in question extends. It is true that the bank has not, for a great number of years, been practically used to give any further protection or support of the works than it did when first made, and probably it never may be wanted in any other state than that in which it now is. But I cannot take judicial notice of that, and I cannot say but at some future time it may be wanted for the works of the drainage, in such a manner as that it could not be used beneficially for those purposes if there was a common highway over it. And I think the Commissioners had no power to dedicate to the use of the public as a highway, land which they were entrusted with the ownership of, for a special purpose, and for which special purpose this land may at some future period be required."

Now applying the principles laid down in *Rex v. Leake*, and the present case, it seems to me that the dedication of Church Street Ghaut to the public as a highway, would be altogether inconsistent with the purposes for which the ghaut was granted. It was probably contemplated that the ghaut would be made use of by the public in the manner in which it has, namely, as a means of access to and from the sea. But it was evidently the intention of the Government that it should also be the means of raising a revenue for the benefit of the town, whether by tolls or by rents, it is not material to inquire, but it was granted for the express purposes of revenue. If the ghauts were once dedicated as a highway, there was an end to any revenue to be derived from it in any way. There could be no tolls, no sheds or buildings, no obstruction of any sort, and therefore no means whatever of raising a revenue. It has been held, indeed, that a highway may be

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HACKETT, J. dedicated with obstructions or impediments which, if made in an existing highway, would be a nuisance [a]. But the defendant must here prove a dedication of the whole close as a highway, or he has failed to make out his case. The issue raised is, highway or no highway, and ordinarily speaking where a road runs between fences, the whole space between the fences is considered as highway. [*R. v. Wright*, 3 B. & Ad. 681], and any contracting or narrowing of the road is a nuisance. For instance, supposing the dedication in the present case to be established, the Commissioners if they erected sheds or suffered goods to remain for any length of time on the ghaut, would be guilty of causing a nuisance. In fact any effort to utilize the ghaut for purposes of profit would be illegal, once it was established as a highway.

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Mr. Bond has further urged that the Act XIV. of 1856, which vested the property in the Municipal Commissioners has put an end to the trust created by the Grant of 1802. The 4th section of that Act is as follows: "All property moveable and immovable purchased or otherwise acquired before the passing of this Act by the Commissioners or other persons, however, designated heretofore lawfully administering the funds applicable to the Conservancy and improvement of the said town, &c., and now vested in them or any other persons in trust for them for any such purposes, shall, after the passing of this Act, be vested in the Municipal Commissioners for the said towns, &c., as trustees for the purposes of this Act." The purposes of the Act are in the preamble, stated to be, to make better provision for the conservancy and improvement of the several stations of the Settlement of P. W. Island, Singapore and Malacca, and to invest the Municipal Commissioners for each of the said towns and stations with the powers hereinafter mentioned. Then in section 6, it is said, that the Commissioners with the consent of the Local Government may lay out and make new streets and roads, &c. I presume the argument on this point is, that the Commissioners under the powers of the Act have dedicated this ghaut and made it into a street. But it appears to me that the evidence of what occurred subsequently to 1856, is opposed to any presumption of dedication. It is in evidence that for some time previous to 1856 the Municipal body had contemplated letting out the various ghauts, and we find that in 1859, less than three years after the Municipal Commissioners came into existence [the Act 27 of 1856 was not passed until 20th December, 1857], Church Street Ghaut was rented out, a fact which conclusively rebuts any presumption of its dedication as a highway. I think, therefore, even admitting that the Act of 1856 empowered the Commissioners to dedicate Church Street Ghaut to the public as a highway, that there is no satisfactory evidence of such dedication.

It is also said by Mr. Bond that only a portion of Church Street Ghaut is included in the Grant of 1802, and that the new portion is not subject to the trusts of the grant and therefore may be the subject of a dedication as a highway. But it seems to me

[a] See *Le Neve v. Vestry of Mile End*, 8 E. & B. 1054, and *Morant v. Chamberlain*, C. H. & N. 541.

that even agreeing that one portion of the ghaut is not subject to the trusts of the grant, still this does not help the defendant inasmuch as he is bound to show that the whole ghaut is a highway, apart from the difficulty of holding that the trustees, whoever they were, intended to dedicate one portion and not to dedicate the other, the evidence of user being precisely the same with regard to both the old and new portion of the ghaut.

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On the whole case, I am of opinion, that previous to 1856 the Municipal Committee had no power to dedicate the Church Street Ghaut as a public highway, inasmuch as such dedication would have been altogether inconsistent with the purposes for which the ghaut was granted. Any dedication of the ghaut as a highway in the full sense of the word, would have put an end for ever to any revenue to be derived from it.

And as to what has occurred since 1856, I think the whole evidence rebuts the idea of any dedication being intended. The account given by the witnesses of the state of Church Street Ghaut in modern times, of the bad state in which it was kept, of the constant obstructions in the shape of piles, of bricks, timber, firewood and other articles, all this seems to me to negative the idea that the Municipal Commissioners intended to dedicate the ghaut to the public as a highway.

But in deciding this, I wish to guard against being understood to decide anything more, whether the public may not have acquired a right of passage over the ghaut, subject to certain restrictions is a question into which it is unnecessary to enter, as it is not in issue. All I intend to decide is that I do not consider that Church Street Ghaut has been dedicated to the public as an ordinary highway.

I now come to the fifth plea, [the fourth plea having been held bad in the demurrer] [a] in which the defendant relies upon a private right of way on foot and with horses and other cattle and with carriages from the highroad over the Church Street Ghaut to the premises occupied by Messrs. Lorrain, Gillespie and Co., and *vice versa*.

The evidence in the case shewed, that for a long time, certainly ever since the year 1810, and probably previous to that date, there was a gate in the premises now occupied by Messrs. Lorrain, Gillespie and Co., opening in the Church Street Ghaut, and that this gate has been used ever since by the occupants of these premises as an ordinary access to them for all purposes. The user, therefore, has been for a sufficiently long period of time to support the presumption of a grant of private right of way. But Mr. Rodyk has contended, that the whole evidence tends to shew that there was only a permissive user of this right of way, and that you are not to make the same presumption in the case of trustees for public purposes as you would in the case of private individuals. He also cited the *Attorney-General v. Magdalene College*, 2 House of Lords Ca. 189, to shew that it was only in the case of the property being parted with for a valuable consideration, that the rights of

[a] ante p. 272.

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Now with regard to the point that the user was only permissive I can find no evidence in the case to support that view. The user has the ordinary use of a gate for every purpose for which it was required, and no permission was asked or granted.

But Mr. Rodyk relies on the circumstance that for a very long period the premises now occupied by Messrs. Lorrain, Gillespie and Co., were occupied by the officers of the Municipality and that under those circumstances the same inference cannot be made as if the premises had been occupied by strangers, and that it might well be, that the Municipal Committee permitted this use of the gate in question without intending thereby to confer any right of way. But with reference to this argument, I think, it is sufficient to observe that it is in evidence that on the opposite side of the ghaut, to Lorrain, Gillespie and Co's premises, in the premises occupied by Mr. Nairne, there is a gate which has been in existence for a great many years, and as to which there never has been any question as to the right of way. This fact seems to me to rebut the inference which Mr. Rodyk wishes to draw as a matter of fact, namely, that it was only the accident of the Committee having their offices in Church Street Ghaut, which caused the gate opening on the ghaut to be tolerated, whereas, in fact, we have it clearly established that a similar gate, with a like right of way, existed in the opposite premises which were in the possession of persons unconnected with the Municipal body.

As to the argument, that presumption against trustees for public purposes is not clearly made, and the effect of the Statute of Limitations as concerns trust property, I will deal with them both together. And first, I think it necessary to point out what strikes me as a fallacy in Mr. Rodyk's reasoning. He has argued this part of the case by analogy to cases in which the trust property has been alienated by the trustees, and the question has arisen as to whether the entire *cestui que* trusts should be bound by the alienation. The question here is whether it was altogether inconsistent with the purposes of the trusts that a right of way should be granted over the trust property. This latter question seems to me to differ somewhat from the other. The analogous case to those cited by Mr. Rodyk would be, if the Commissioners had sold or leased Church Street Ghaut; in fact, had altogether deprived the town of the use of it, and the people of the town disputed their right to do so. The present question seems to me to resemble somewhat that which arose in *Rex v. Leake*, whether it was consistent with the purposes of the trusts that a right of way should be granted.

To return once more to the early history of the town we find that the ghauts were placed opposite the principal streets intersecting Beach Street, and, I think, there can be no reasonable doubt that one of the objects of their institution was to afford the inhabitants of George Town easy access to the sea. They were to all intents and purposes public ghauts, *i. e.*, public landing places. No doubt they were stated in the grants to be granted for the

express purpose of establishing a revenue and their user must, I think, have been restricted in accordance with the terms of the grant, but when we look at the manner in which they were formed, their early history, their mode of using their position with regard to the town and their name, it is impossible to avoid the conclusion that although intended to aid the revenue, they were also meant for the general convenience of the people of the town. Now this being so, was there anything in the nature of the trust to prevent the trustees from granting the owners of conterminous property reasonable access to the ghaut? Is the ghaut to be viewed in the same way as enclosed premises, which might be seriously damaged by the allowance of such an easement? Would it be a breach of the trust to permit such an encroachment on their right? I think not, I think it was quite within the scope of the discretion of the trustees or the persons managing the property, to permit the owners of the adjoining lots reasonable access to the ghaut, and that there would be nothing inconsistent with the trust in such a user of the ghaut, and we find that, in fact, in most of the ghauts, such gates have existed as far back as the time of living memory.

For this reason, I think, that it was quite consistent with the original purpose for which the ghaut was established, to grant a right of way over the ghaut, and with regard to the upper gate the defendant has made out his plea.

But the plaintiffs in the petition allege two trespasses, the breaking down of two boardings, one of these was at the upper gate of which I have been speaking, and the other was at a gate much lower down in the ghaut. This gate stands in a different position from the other. It has only recently been opened, and it stands in a part of the property which was not in existence at the original grants, having since been reclaimed and filled in. Strictly speaking, therefore, the plea alleging a grant previous to 1802, could not be supported by a proof of right of way over property, which did not come into existence until many years after the alleged grant. But apart from this legal difficulty, I do not find that the evidence in support of this second right of way is sufficiently clear and distinct. There is no doubt that the gate has only been made recently, and not sufficiently long ago to confer a right, but then it is said that before the wall was made in that part of the ghaut, we were in the habit of passing and repassing over the ground in question, and thus acquired a right of way. If user of this sort were shewn for a sufficient length of time, no doubt it would establish a right of way, but there is no evidence as to the length of time that this use was made of the lower portion of the ghaut, and I am, therefore, of opinion that the defendant has not succeeded in supporting his plea as regards the lower gate.

On the whole case, there must be judgment for the plaintiffs.

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ABDUL WAHAB BIN MOHOMAT ALLI

v.

SULTAN ALLI ISKANDER SHAH,

[SULTAN OF JOHORE]. [a]

MALACCA.

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1843.

May 4.

A foreign Sovereign Prince, who remains in this country for a protracted time, is entitled to no greater exemption from the jurisdiction of the Courts of this Colony, than his Ambassador would have been : and if he engage in mercantile transactions, such as borrowing money in his private capacity, on a promissory note, he is liable to be sued thereon in such Courts, and cannot claim exemption on the grounds of his being a Sovereign Prince.

Action against the defendant, Sultan of Johore, [b] on a promissory note. Plea to the Jurisdiction, that defendant was a Sovereign Prince, recognized as such by the Straits Government by their treaty with Johore. Replication that the debt was for money lent the defendant, and entrusted to him in his private capacity, and not as Sultan, and that there was nothing in the treaty to exempt the defendant from liability under such circumstances. The facts appear in the judgment.

J. R. Logan, for plaintiff.

C. Baumgarten, for defendant.

Cur. Adv. Vult.

Judgment was delivered this day by

Norris, R. This is an action of *Assumpsit* on a promissory note alleged to have been made by the defendant in favor of the plaintiff for \$971.17½. The defendant pleads to the Jurisdiction of the Court and claims exemption as a Sovereign Independent Prince, Sultan of Johore, and the heir and successor of the late Sultan, who by treaty, dated 2nd August, 1824, ceded the Island of Singapore to the English East India Company.

The plaintiff replies in substance, that there is nothing in the treaty referred to, from which it can be interpreted or inferred that the defendant should be at liberty to engage in mercantile affairs at Malacca, buying on credit or taking up money on loan under the irresponsibility to which he lays claims.

This is perfectly true; there is nothing in the treaty leading to such an inference, no stipulation for an allowance, to the defendant in particular of greater privileges than are conceded by the law of nations to independent Sovereigns in general. I must look therefore to general principles and precedents, in order to ascertain whether the defendant in the present instance can be properly regarded as altogether exempt from the Court's Jurisdiction.

For the defendant, reference has been made to *Vattel's Treatise on the Law of Nations*, Book 1, Chap 1. s.s. 4, 5 & 6,

[a] This case, together with the following one, also a Malacca case, [*Attorney-General v. De Wint*,] the papers regarding which were only obtainable at this period of the work, and consequently long after classification, are only inserted on account of their importance.—J.W.N.K.

[b] Now styled *Maharajah* of Johore, G. N. 25 June 1868.

wherein it is laid down that "every nation which governs itself, under what form soever, *without dependence* on any foreign power, is a *Sovereign State*;" that those states are equally to be accounted Sovereign States which have united themselves to another more powerful by an *unequal alliance*; and that, consequently, a weak State, which in order to provide for its safety, places itself under the *protection* of a more powerful one, and engages, in return, to perform several offices equivalent to that protection, without, however, divesting itself of the right of Government and Sovereignty, does not, on this account, cease to rank among the *Sovereigns, who acknowledge no other law than that of nations*." These principles are undeniable, but of too general a nature to throw much light on the present question. The 7th Chapter, 4th Book of the same work which treats of the rights, privileges and immunities of Ambassadors and other public ministers, seems more to the purpose, and section 108 of that Chapter, introduces the question as to the rights and privileges of a Sovereign in a foreign country. "It is asked," says the author: "What are the rights of a Sovereign who happens to be in a foreign country, and how the master of the country is to treat him? If that prince be come to negotiate or to treat about some public affair, he is doubtless entitled in a more eminent degree to enjoy all the rights of Ambassadors. If he be come as a traveller, his dignity alone, and the regard due to the nation which he represents and governs, shelters him from all insults, gives him a claim to respect and attention of every kind, and exempts him from all jurisdiction. On his making himself known, he cannot be treated as subject to the common laws; for it is not to be presumed that he has consented to such a subjection; and if a prince will not suffer him in his dominions on that footing, he should give him notice of his intentions. But if the foreign prince forms any plot against the safety and welfare of the State, in a word if he acts as an enemy, he may very justly be treated as such. In every other case he is entitled to full security, since even a private individual of a foreign nation has a right to expect it." These principles also are not to be contested, but they do not seem to embrace precisely such a case as the present, that a Sovereign Prince, not come, as a mere traveller or temporary visitor, but resident for the last six or seven years and, for aught, that appears to the contrary, permanently settled and acting, it may be said, as his own Ambassador in the British dominions. Under such circumstances, the rights, privileges and immunities of an Ambassador would seem to be abundantly sufficient, and all that such a prince so situated could reasonably claim. Accordingly, in the next paragraph, Mr. Vattel quotes the example of "Peter the Great, who when determined personally to visit foreign countries in quest of the arts and sciences to enrich his empire travelled in the retinue of his own Ambassadors," that extraordinary man thus intending, it may be presumed, to intimate, that as he could not, during the protracted visits which he contemplated, consistently claim greater privileges than those of an Ambassador,

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so he had no design to shelter himself under the plea of sovereignty, from the just consequence of an abuse of those privileges. Now the exemption of an Ambassador *as such*, from all civil and criminal jurisdiction in the foreign country where he is called upon to exercise his high functions is universally admitted by all civilized nations, and the reasons are given at length, in the 92nd section of the last quoted chapter of Vattel and section 1st of the chapter next following. And this necessary independence which protects the *person* of an Ambassador from an arrest under legal process, extends also, as observed in section 113 of the 8th Chapter, to "his retinue, his baggage, his necessaries, everything which belongs to his person in the character of a public minister, everything which is intended for his use or which serves for his own maintenance and that of his household, everything of that kind partakes of the minister's independency, and is absolutely exempt from all jurisdiction in the country. Those things, together with the person to whom they belong, are considered as being out of the country." In the next section, however, it is added, and the restriction is especially important with reference to the present case. "But this exemption cannot extend to such property as evidently belongs to the Ambassador under any *other* relation than that of minister. What has no affinity with his functions and character, cannot partake of the privileges which are solely derived from his functions and character. Should a minister, therefore, [as it has often been the case] embark in any branch of *commerce*, all the effects, goods, money and debts active and passive, which are connected with his mercantile concerns, and likewise all contests and law-suits, to which they may give rise, fall under the jurisdiction of the country. [a] And although, in consequence of the minister's independency, no legal process can, in these law-suits, be directly issued against his person, he is nevertheless, by the seizure of the effects belonging to his commerce, indirectly compelled to plead in his own defence. The abuses which would arise from a contrary practice, are evident. What could be expected from a merchant vested with a privilege to commit every kind of injustice in a foreign country? There exists not a shadow of reason for extending the ministerial immunity to things of that nature. If the Sovereign who sends a minister is apprehensive of any inconvenience from the indirect dependency in which his servant thus becomes involved, he has only to lay on him his injunctions against engaging in commerce, an occupation, indeed, which ill accords with the dignity of the ministerial character." And then follows a qualification restricting the liability to seizure even in these cases, to such of the minister's effects as really belong to, or are connected with his commercial concerns and have no relation to his public character.

Now if such be the liabilities incurred by an Ambassador, who abuses his public privileges for private purposes, can it be reasonably contended that a Sovereign Prince who is permanently resi-

[a] But see *Taylor v. Best*, 23, L. J. C. P. [n. s.] 89.

dent in a foreign country, enjoying the full protection of its laws, is exempt from all legal responsibility, when he lays aside as it were, his sovereign character and descends to the level of an ordinary subject, by engaging in mercantile transactions wholly unconnected with his royal station? I think not. Under such circumstances, he may fairly be presumed to have waived, to that extent, his exclusive privileges, and by voluntarily entering into contracts with common men, to have impliedly given his assent to those laws to which all contracting parties are of necessity, answerable; for where there is no mutuality of rights and remedies, there can be no legal contract. And as, on the one hand, a Sovereign thus contracting would probably not scruple, or at least would think himself entitled to demand legal redress for a breach of any such contract, so, on the other, he must, on the principles of even-handed justice, be considered as impliedly acquiescing in the other party's legal right to redress in case of need. Now the instrument on which the present action is founded, is a contract of this description, *viz.*, a promissory note importing upon the face of it, that it is given in consideration of money advanced by the plaintiff to the defendant *for the purposes of trade*; and for the enforcement of such trading contract, the defendant's effects are in the ordinary course of law, and with the qualification above mentioned, liable, in my opinion, notwithstanding his sovereign character, supposing that to have been satisfactorily proved. Whether, then, the evidence on this head is sufficiently conclusive, is now the important question for consideration. I will, however, first advert to a few cases which have been brought to my notice as, apparently, parallel to the present, but all of which are, in my opinion, distinguishable from it. The first is the case of Hussein Shah, the father of the present defendant and late Sultan of Johore, who, it appears, was sued in May, 1833, before this Court, at Singapore, and whose plea to the Jurisdiction was allowed by Sir B. Malkin. But in that case, the sovereign character of the defendant was undoubted, and there was nothing to shew that the action arose out of a *trading* transaction. [a]

The next case was that of the present King of Purlis and Quedah, which occurred in August, 1834, when the King was sued in the Court at Malacca for upwards of 1,300 dollars for repairs done to his house, and whose plea to the jurisdiction, *viz.*, that he was a Sovereign Prince residing here by compulsion and, against his will, [b] was allowed by Sir B. Malkin. In the present instance it is not pretended that the defendant is under any compulsion, or that he is other than a perfectly voluntary resident.

The third case occurred in December of the following year, 1835, also at Malacca, when Syed Saban, King of Rumbow, was sued for a trifling sum of 60 dollars, and whose plea to the Jurisdiction, *viz.*, that he was a Sovereign Prince, and had arrived only two days previously at Malacca, to transact certain political business with the British Government, was allowed by the Resident Councillor

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[a] See *Munden v. Duke of Brunswick*, 10 Q. B. 656, 662.

[b] See *Ishmahl Lazamana v. East India Co.*, and *In Re Trebeck*, *ante* p. 4, and *Nairne v. Rajah of Quedah & anor.*, *ante* p. 145.

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Mr. Garling. In that case, it does not appear, as in the present, either that the debt arose in the course of *trade*, or that the residence of the defendant was other than *political and temporary*.

The case of the *defendant's mother*, who was sued in this Court in November, 1841, on a promissory note for 1,600 dollars, and whose plea to the Jurisdiction as Queen Dowager of the late Sultan, was properly overruled by Mr. Salmond, on the ground that even the Queen Consort of England was entitled to no such privilege, I merely notice as being, I believe, the only other instance of these Royal pleas in this Court.

For argument's sake, I have hitherto assumed the fact of the defendant's sovereignty as either admitted or proved; but although the replication does not in terms, deny the defendant's allegation in that respect, it can scarcely be said to admit it, and the documents put in by the defendant, in order to establish the fact, do not appear to me sufficiently conclusive on the point. The original treaty made with the defendant's late father by the East India Company, is nothing to the purpose, and the language of the Governor's Notification, dated 16th September, 1840, though somewhat ambiguous, does not necessarily import more than that the Government had acknowledged the defendant's claim to the property at Singapore, adverted to in the 8th Article of the Treaty. The terms are as follows:—

“NOTIFICATION.

Mahomed Alli, eldest son of the late Mahomed Shah, Sultan of Johore, having arrived at this station, it is hereby notified to all whom it may concern, that he is looked upon by the British Government, in every respect, as the *successor* of his late father, and entitled to all the property upon the ground granted to the late Sultan by the East India Company, situated at Campong Glam, and more particularly, adverted to in the 8th Article of the Treaty entered into by the late Sultan with John Crawford Esq., as the Representative of the East India Company, on the 2nd day of August, 1824.

By Order of the Hon'ble the Governor,

T. CHURCH,

Resident Councillor.

Singapore, 16th September, 1840.”

Had this document been intended as a formal recognition [a] of the defendant's *sovereignty*, it would, no doubt, have been couched in more decided terms. It would, probably, have run somewhat as follows: Tunko Alli, *Sultan of Johore*, and son, &c., having arrived, &c., “is looked upon by the British Government “as *Sultan of Johore* and in every respect,” &c. But in its present shape, it can scarcely be construed into more than an acquiescence in the defendant's claim to the piece of ground specified. Had the defendant ever been proclaimed or acknowledged as Sultan by his alleged subjects at Johore, one would have thought there would have been no difficulty in establishing the fact by indisputable evidence, and it would be violating an important legal principle to admit as sufficient proof, evidence of a secondary con-

[a] See *Lim Guan Teet v. Tunkoo Akobe*, 24th April, 1882, *infra*. 1539

sideration, when the best, for aught, that appears, might easily have been adduced.

On the whole, then, I am of opinion, that the Court has jurisdiction to enquire into the case; and I may, in conclusion, mention as an additional argument for its interference, that the defendant and his mother are known to have availed themselves freely of the instrumentality and assistance of the lower courts here, as complainants both in civil and criminal matters, and that too, I am sorry to add, on a late occasion at the Police office, in a way which reflected anything, but credit on all who were concerned in or advised the prosecution. The plea to the jurisdiction is, therefore overruled, and the defendant must plead to the merits.

Plea overruled.

A plea of infancy at the time of making the contract, was then filed; and upon issue being joined, and evidence heard on both sides, judgment was given for the plaintiff for the amount of his demand, with interest, and costs.

ATTORNEY-GENERAL v. De WIND. [a]

The Crown, under the Malacca Land Act 26 of 1861, has power to commute the tenth payable in kind by landholders in that Settlement, into a money payment; and that, whether the landholder be a "prescriptive tenant" or not.

Query. What is a "prescriptive tenant" in Malacca, and within the aforesaid Act?

MALACCA.

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AG., C. J.
1868.

January 7.

This was a special case for the opinion of the Court, touching the liability of the defendant, a landholder in Malacca, to pay a sum of \$ 44.85½ [somewhat in the nature of an annual quit-rent] in money, by order of the Governor, in lieu of payment in kind, as had previously been the practice under the Portuguese and Dutch Government, and subsequently even of that of the British. The facts set out in the case, fully appear in the judgment. The following exhibits referred to therein, are here set out at full length.

EXHIBIT A.

Whereas Johannes Bartholomeus De Wind, by virtue of certain Grants issued by the preceding local Governments, referred to in a certificate, dated 25th August, 1797, and signed by J. Belmont, J. Rappa, J. Hamel and J. B. Westerhout, Executors of Abraham De Wind, deceased, and countersigned by C. M. De Groot, one of the members of the College of Justice at Malacca, by virtue of legal powers in that Court invested by the then existing Government, which certificate states that the lands called Pangor, Passal, Tadon, Moerlimow, Duyong, Sercam, Ayer Towah and Kassang, are given over to John Jacob Bartholomeus and Abraham De Wind, as heirs of the aforesaid Abraham De Wind, and whereas two of the said heirs, named Jan Jacob De Wind and Abraham De Wind have since died, and the said lands devolved to the aforesaid Johannes Bartholomeus De Wind.

[a] This decision is now inserted solely on account of its importance and original character. See note [a] *ante*, p. 298.

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Whereas by further reference, it appears, that the aforesaid A. De Wind inherited the same from his father Claas De Wind as per title deed registered in the College of Justice, 30th August, 1785, and that the said Claas De Wind, on 8th April, 1752, purchased of Hendrick Nicolaage that part of the land called Poongor [*alias* old Malacca] extending from the river of Duyong to Tanjong Pallas, on the sea-beach, but that inland the extent was not known on account of the deep jungle preventing the right measurement of it. Furthermore, that the aforesaid Hendrick Nicolaage, purchased the aforesaid land called Poongor boundaries as above stated, of Calicaula Chitty, the 29th June, 1733, which deed of 1733 refers to another of the 13th June, 1731, which is not to be found amongst the records, the book for that year being missing, and whereas the said Claas De Wind inherited of Maria Altheer, his wife, that part of the land called Passal, &c., extending from the last mentioned boundary [*viz.*, Tanjong Pallas] to the Sercam River, being about 6½ miles on the sea-beach, but that inland the extent was not known on account of the deep jungle which prevented the measurement of it, and whereas by further reference to the records of 17th January, 1750, a deed of sale is registered wherein the said Maria Altheer purchased these said lands of Joshua Koek. And whereas by a former deed of sale, dated 5th July, 1735, the said Joshua Koek purchased these lands by public auction, and whereas the said land was the property of Kalikanlas as per deed of sale, dated 2nd June, 1708, purchased of Commera, and whereas the said Commera purchased the said lands 14th October, 1699, which book of record is not to be found.

And whereas the said Claas De Wind inherited of Maria, his wife, that part of the lands called Tadoong, Moerlimow and Kassang, extending from the last mentioned boundary [*viz.*, Sercam River] to the Kassang River, being about 7½ miles along the sea-beach, but that inland the extent was unknown on account of the deep jungle which prevented the measurement of it.

And whereas by further reference, the said lands were purchased of Miraudge Chitty, 6th March, 1759.

And whereas the said Miraudge Chitty purchased the said lands of Moeto Mara Chitty, 13th January, 1747, Moeto Mara Chitty purchased it at auction 28th July, 1745.

And whereas on further reference to the records the said lands were purchased by Bellaysom at auction, 19th April, 1735 and 14th May, 1735. This deed of sale refers to a deed of sale, 19th February, 1727, when Caliekaulie purchased it from Hone Qua.

And whereas the said Hone Qua had a deed of sale, dated 29th August, 1669, the book containing this deed is not to be found.

Whereas the said Johannes Bartholomeus De Wind stands possessed of the right of levying from the tenants on all the land stated in the said document one-tenth of the produce of the said land on the terms and conditions therein provided.

And whereas the said Johnnes Bartholomeus De Wind being willing and desirous of transferring and making over to the Honorable East India Company, all the rights, benefits, privileges and emoluments enjoyed under the deeds referred to in the aforesaid documents on certain consideration. And the Honorable the Governor in Council of Prince of Wales' Island, Singapore and Malacca, acting on behalf of the said Honorable East India Company, being on his part willing and desirous to receive the said rights, benefits, privileges and emoluments. The following agreement is entered into by Johannes Bartholomeus De Wind on the one part, and by the Honorable Robert Fullerton, Esquire, Governor, and Honorable Samuel Garling, Esquire, one of the Resident Councillors of Prince of Wales' Island, Singapore and Malacca, on the other part, that is to say—

Johannes Bartholomeus De Wind, on behalf of himself and heirs relinquish and transfer to the United Company of Merchants of England trading to the East Indies, all the rights, title and advantages resulting to him from the possession of the deeds or documents aforesaid, which are now herewith delivered over to the Honorable Samuel Garling, Esquire, on the part of the Government of Prince of Wales' Island, Singapore and Malacca, with the regular transfer of the same endorsed thereon.

The Honorable Robert Fullerton, Esquire, and Honorable Samuel Garling, Esquire, as Governor and Council, on the part of the United Company of Merchants of England, trading to the East Indies hereby acknowledge to have received the deeds, title, privileges, advantages and benefits aforesaid, and in consideration thereof, hereby covenant and agree to pay to the aforesaid Johannes Bartholomeus De Wind and his heirs for ever, so long as the Settlement of Malacca remains under the British Flag, the sum of sicca rupees four thousand, *per annum*, by such instalments as may be mutually agreed on.

It is mutually covenanted and agreed that the payment of the instalment herein before provided for, shall commence on the first of November, eighteen hundred and twenty-eight, from which day the right of levying the one-tenth of the produce from the lands shall be vested in the Government acting for the Honorable East India Company, and for ever cease on the part of the aforesaid Johannes Bartholomeus De Wind and his heirs.

And whereas in case the Settlement and territories of Malacca should be hereafter transferred to any other Power, Government do bind themselves previously to retransfer to the present holders or their heirs, all deeds, privileges, rights, benefits and emoluments now delivered, and will put them in possession of all rights and advantages derivable therefrom.

As the said Johannes Bartholomeus De Wind has rented to others the privileges of collecting the tenth in certain produce of the aforesaid lands, it is agreed that the officers of Government shall receive from the contractor, the stipulated sum due from the said Lim Hingoon in lieu of the tenth up to the expiration of the term of contract.

This agreement made and entered into at Malacca, this fourteenth day of March in the year of Our Lord, one thousand eight hundred and twenty-eight. In witness of which the said Johannes Bartholomeus De Wind, on the one part and the said Honorable Robert Fullerton, Esquire, and Honorable Samuel Garling, Esquire, as Governor in Council, have set our hands and seals.

(Signed) R. FULLERTON, [L. S.]

(„) S. GARLING, [L. S.]

(„) J. B. DE WIND, [L. S.]

Signed, sealed and delivered where
no stamps are used, in the presence of

(Signed) A. A. VELGE.

(„) D. KOEK.

Witness to the Governor's signature,

(Signed) EDWARD LAKE, CAPTAIN.

(„) M. P. BUNBERY, CAPTAIN.

EXHIBIT B.

Statement of the ages of the six surviving children of the late Johannes Bartholomeus De Wind, Esquire, gentleman of Malacca, up to the period of his death which occurred on the 13th February, 1842.

Abraham Adrian De Wind.....	{	Born 21st May, 1820, 21 years, 8 months and 23 days.
Catherine Maria Ferrier, widow of the late Major Ferrier, 48th Regiment, M. N. I., Resident Councillor of Malacca	{	Born 2nd July, 1821, 20 years, 7 months and 11 days.

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ATTORNEY- GENERAL v.	Edmund Robert De Wind	{ Born 21st March, 1836, 5 years, 10 months and 23 days.
DE WIND.	Arthur Hughes De Wind	{ Born 11th March, 1837, 4 years, 11 months and 2 days,
	John Bartholemeus De Wind	{ Born 5th December, 1839, 2 years, 2 months and 8 days.

EXHIBIT C.

Whereas great inconvenience being apprehended as likely to arise from the delay in carrying into operation the agreement hereinbefore recited, to so late a period as the 1st November, next, it is mutually covenanted and agreed that the payment of the instalment provided for, shall commence on the 1st July, 1828, from which day the right of levying the one-tenth of the produce of the lands, as well as all other privileges, benefits, rights and emoluments, shall be vested in the Government acting for the East India Company, and for ever cease on the part of the aforesaid Johannes Bartholomeus De Wind.

(Signed) S. GARLING.

J. B. DE WIND.

Malacca, 3rd June, 1828.

EXHIBIT D.

From

THE RESIDENT COUNCILLOR
AT MALACCA.

To

A. A. DE WIND, Esq.

Sir,

On behalf of the British Government, I do myself the honor of submitting to you as owner of one-eighth share of the lands of Candang Allye, &c., the following proposal in regard to these lands, to the effect that a new covenant be entered into by you with the Government, transferring all rights, titles and interest that you may possess in these lands in perpetuity to the British Government, receiving the annuity that is now paid in perpetuity also, and not contingent, as it now is, on the following conditions, viz: for so long as the Settlement of Malacca remains under the British Flag, when in case the Settlement shall be transferred to any other power, the annuity shall cease, and all deeds, privileges, rights, benefits and emoluments transferred to Government, shall be transferred to their holders or their heirs.

This latter contingency, viz. the transfer of Malacca by the British to any other Power, or its relinquishment by the British Government, is an event of such a very improbable occurrence, that it is difficult to perceive what advantages former holders of these deeds, rights, &c., are to gain by a retention of the clauses in the present covenants, containing these conditions. Whilst by their excision and the contract to be entered into by both parties being a simple one of exchange, the considerations given on both sides being in perpetuity, unfettered by other conditions, the advantages to all parties will be great. I need hardly state that the object in view from the present proposal, is the great good that must eventually accrue to this Settlement, in which all parties must participate.

I would beg to point out a few that would result from the lands annuitants' entering into the covenant now proposed, Government would be put in a position to enable holders of commutation deeds, which are more of the nature of leases, and that too of but a very limited period, not now averaging

more than 10 or 11 years than anything else, to exchange these valueless titles into deeds in perpetuity, whereby land would be held in fee simple which from the conditions contained in the present covenants cannot now be done, and not on lease as now, subject to revision and possible raising of rent at the expiry of the lease. Whilst from the superior value of the titles, the value of the land would be considerably increased, from the greater security of the title, substantial parties belonging to the place would be more willing than they now are, to invest their capital in agricultural pursuits, whilst the facility of procuring lands at Malacca on the same footing as now obtains at Penang, Province Wellesley, and Singapore, where the system of selling lands out-right in fee simple, only introduced lately, has succeeded so well and with great benefit to all parties, would attract foreign capital and enterprise, all of which cannot fail to prove of vast benefit to Malacca, and raise it from its hitherto depressed state consequent on the peculiarity of its land tenures.

May I request your careful consideration of the proposal now made to you, and which so materially affects for good the interest of yourself, your descendants, and the Settlement at large, and in hopes of a favourable reply,

I have the honor to be,

Sir,

Your most obedient Servant,

(Signed) I. FERRIER,

Resident Councillor.

Malacca, 30th September, 1853.

EXHIBIT E.

To

THE HONORABLE CAPTAIN FERRIER,

RESIDENT COUNCILLOR,

&c., &c., &c.,

MALACCA.

Sir,

I have the honor to acknowledge the receipt of your letter under date the 30th ultimo, submitting on behalf of the British Government, a proposal to me as proprietor of one-eighth share of the lands at Candang Allye, &c., to the effect "that a new covenant be entered into by me with the Government, transferring all rights, titles, and interest that I may possess in these lands in perpetuity to the British Government, receiving the compensation that is now paid in perpetuity also and not contingent, as it now is on the following conditions, viz: for so long as the Settlement remains under the British Flag, when in the event of the Settlement being ceded to any foreign power, the annuity shall cease and all deeds, privileges, rights, benefits and emoluments transferred to Government, shall be retransferred to their holders or to their heirs."

In reply, I beg to say that, after a careful consideration and mature deliberation of the terms proposed, it is not within my power to meet the wishes of the Government, and I must, therefore, respectfully decline entering into any new covenant. The transfer of this Settlement to any other power or its relinquishment by the British Government is an era not at all likely to occur, although by no means impossible, and I do not perceive any advantages to be derived from the present proposal, either to myself or to those who with me participate in equal shares in the lands above referred to.

I have the honor to be,

Sir,

Your most obedient Servant,

(Signed) A. A. DE WIND.

Malacca, 3rd October, 1853.

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T. Braddell [*Attorney-General*] for the Crown.
R. C. Woods, senr., for the defendant.

Cur. Adv. Vult.

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On this day judgment was delivered by
Hackett, Ag., C. J. This is a special case for the opinion of
the Court, and is intended to raise the question whether a commu-
tation of the payment in kind due by the defendant in respect of
certain lands in the district of Malacca, to a money payment,
made by the Governor of Prince of Wales' Island, Singapore and
Malacca, under Act 26 of 1861, is valid.

The tenure of land in Malacca seems to be different from that
at Singapore and Penang, and required to be dealt with by
Government in an exceptional manner. For instance, when Act
16 of 1839, providing for the assessment of landholders in the
Straits Settlements was passed, a special exception was made in
favour of those who held their lands by prescription in the district
of Malacca.

In a minute by Lord Auckland on the land question in the
Straits, he says, speaking of Malacca :

"The Portuguese and Dutch seem to have left the cultivators as they
"found them..... The tenth of the produce is by the old law of the country, the
"tax due to the State, and the property of the land is acquired on clearing the
"jungle.....

"We have not interfered with those whom we found in possession under
"these circumstances, who appear to form a poor and scanty population of
"village agriculturists, but we have by the Malacca Land Regulation passed
"by the Penang Government as Regulation IX. of 1830, assumed to the State,
"the absolute property in all waste or forest land." [a]

I regret that I have been unable to obtain a sight of this land
Regulation, which might have explained provisions in some of the
Indian Acts with reference to Malacca which, without extrinsic
evidence as to their meaning, are not without difficulty.

However, I think, we may take this as certain, that previous
to the cession of Malacca to the English, the Government title over
the whole or the greater part of the province [that is, the right to
exact one-tenth of the produce from the cultivators of the soil] was
transferred to certain persons, who were in possession of this title
when Malacca was ceded to the East India Company, and who
were therefore actually the lords of the soil. One of the most im-
portant of these middlemen was J.B. De Wind, the defendant's father.

In the year 1828, the Government having found considerable
difficulty in dealing with the lands in Malacca, in consequence of
their subjection to this burden, entered into an arrangement with
these proprietors, by which they were to receive fixed annuities in
consideration of the surrender of their rights to the East India
Company.

One of the persons who thus surrendered their rights, was the
defendants father, J. B. De Wind.

This arrangement did not prove to be a satisfactory settlement.

In the first place, some of the persons who thus surrendered
their rights [and amongst them J. B. De Wind] were only tenants

[a] See *Papers and Correspondence, Land Revenue Administration, S.S., 1844*,
p. 119 § 229.

for life, a circumstance which immediately raised a question, and, in the second place, there was a condition inserted in these agreements, that, in the event of the cessation of British rule in Malacca every person so transferring his rights should resume them. [a]

In the result, this condition seems to have in effect nullified the surrender, and prevented the Government from dealing freely with the land encumbered as it was, with this cause of re-entry on the cessation of British rule in Malacca.

In the year 1853 [J. B. De Wind having in the meantime died] the Government endeavoured to prevail on the defendant as representing one-eighth share of his father's estate, to enter into a new covenant, transferring all his rights to the Government in perpetuity, and receiving the annuity in perpetuity also. To this proposal the defendant returned a decided negative.

I now come to the facts and questions stated in the special case.

"The defendant abovenamed is one of the six surviving heirs of the late Johannes Bartholomeus De Wind, formerly of Malacca. The said Johannes Bartholomeus De Wind, who had only a life interest in the lands hereinafter mentioned [according to the provisions of the Will of his father Abraham De Wind, bearing date, 7th November, 1793, and codicil bearing date, the 19th day of November, 1796, the said lands being inalienable by his descendants or heirs] entered into an agreement under his hand and seal, dated at Malacca, the 14th day of March, 1828, with the then United Company of Merchants of England trading to the East Indies, which agreement is hereafter set out as a part of this case. [b]

That at the time the said Johannes Bartholomeus De Wind entered into the agreement, dated 14th March, 1828, the defendant Abraham Adrian De Wind was a minor, as was also his sister Catherine Maria; the other heirs of the said Johannes Bartholomeus De Wind were born subsequent to the date of the said agreement, and their respective ages at the death of their father in 1842, were as set out in the memorandum annexed to this petition [marked B.] [c]

A further agreement was afterwards on the 3rd day of June, 1828, entered into by the same parties, which further agreement is also set out as a part of this case. [d]

The said Johannes Bartholomeus De Wind died in the month of February, 1842.

After the defendant's ancestors received the title deeds set out in the agreements above referred to, the defendant's ancestors occupied and cultivated certain portions of the lands referred to in the said title deeds, and after Government received possession of the said several title deeds, the defendant continued to occupy and cultivate parts of the said lands, and other parts were allowed by the defendant to lie waste for several years and were afterwards, i. e., since January, 1862, recleared of the jungle and cultivated by the defendant.

That on the 30th September, 1853, the Government through

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[a] See *Moraiss & ors. v. De Souza*, ante p. 27. [c] Exhibit B., ante p. 305.

[b] Vide Exhibit A., ante p. 303. [d] Vide Exhibit C., p. 306.

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Captain Ferrier, then Resident Councillor at Malacca, submitted to the defendant, as owner of one-eighth share of the said lands, a proposal for the transfer of all rights so possessed by the defendant in these lands in perpetuity to the Government, receiving the annuity now paid in perpetuity also, and other provisions as will more fully appear on reference to the official letter of the said Resident Councillor, and copy of defendant's reply thereto, which are hereafter set out as part of the case. [a]

The Honorable the Governor of Prince of Wales' Island, Singapore and Malacca, by virtue of the powers in him vested by Act of the Legislative Council of India, No. XXVI. of 1861, entitled "An Act to regulate the occupation of land in the settlement of Malacca" commuted the payment to which the defendant was liable under section 3 of the said Act XXVI. of 1861, for the occupation of the said lands for a money payment of one cent, and a yearly quit-rent at the rate of 25 cents per acre, on the following lands:—

Ayer Moley	...	108	acres,	2	roods,	39	perches.
Sempang	...	34	"	0		5	"
Tadong	...	9	"	1		22	"
Allay	...	11	"	3		13	"
		<hr/>		<hr/>		<hr/>	
		163		3		39	

the above being situated beyond four miles from the town of Malacca.

And the rate of 45 cents per acre for the following lands situate beyond two miles, but within four miles from the said town:

Allay ... 8 acres, 2 roods, 8 perches.

The amount due for the above commutation is \$44.85½.

Act XVI. of 1839 and XXVI. of 1861, are to be taken as part of this case.

The defendant contends that he is a prescriptive tenant within the meaning of the reservation in section 12 of Act XVI. of 1839 and in sections 1 and 3 of Act XXVI. of 1861, and as such prescriptive tenant, he is not liable to pay any rent or dues to Government other than a payment in kind of one-tenth of the produce of the lands occupied by him, and the defendant tendered to Government as such tenth, a sum of money larger than that now claimed as commutation.

The plaintiff contends that under the Acts above referred to, the defendant is bound to pay to Government as a commutation of tenth or other rents or dues payable to Government, the sum for which the payment has been commuted by the Honorable the Governor.

It has been agreed upon by the parties, that if judgment should go for the plaintiff, this case should be read as if the defendant were solely to be liable for the amount claimed \$44.85½.

Under the circumstances aforesaid, it has been determined by the plaintiff and defendant to concur, and they do respectively concur in the statement of facts herein contained for the opinion of this Honorable Court under the provisions of the Act of the Legislative Council of India, No. XVII. of 1852.

The parties, therefore, pray the opinion of this Honourable Court whether the defendant is such prescriptive tenant as to all the lands so occupied or as to any part thereof.

And if so, whether he is exempt from commutation under the Act XXVI. of 1861.

And, whether he is such prescriptive tenant or not, whether the payment due by him for the occupation of the said lands, is not liable to be commuted by His Excellency the Governor and to have been commuted by His Honor the late Governor of the Settlement, and whether the defendant is not bound to pay to the plaintiff the sum now rated for \$44.85½ yearly, at the end of every year, so long as the said commutation may remain in force."

It appears, therefore, that the defendant and those through whom he claims, have from a time, long anterior to British rule in Malacca, occupied and cultivated certain lands in that district, and that other lands were allowed by the defendant to lie waste for several years and were afterwards [since January, 1862] cleared and cultivated by him, and he contends that he is a prescriptive tenant as to all such lands, and as such prescriptive tenant, is only liable to pay to Government one-tenth of the produce in kind.

Upon this contention the first point which arises is, what is a prescriptive tenant?

Now title by prescription as applied to corporeal hereditaments is strictly speaking unknown to the English law. In the case of corporeal hereditaments the only prescription known, is that negative prescription which arises from the bar which may be pleaded under the Statute of Limitation.

The Acts XVI. of 1839 and XXVI. of 1861 both mention tenants by prescription, as existing in Malacca, and evidently contemplate a species of tenants holding by a title peculiar to that district, but I no where find any definition of the meaning of the term, and it is only inferentially, and by reviewing the history of that district that I am unable to conjecture in what sense the word has been used. From Lord Auckland's Minute which I have already referred to, it appears that under the old law of Malacca, the property in the land was acquired on clearing the jungle, subject to the payment of one-tenth to the State, and he goes on to say that the East India Government did not interfere with the persons whom they found in possession of and cultivating the soil. I think it probable therefore that when the term "tenants by prescription" is used in the Act of 1861, it is applicable to persons who without grant, lease or title-deed of any kind, had acquired by occupancy and cultivation, a sort of prescriptive title to the lands they held; and who were in possession at the time Malacca became subject to the East Indian Government. But although, I think, there is reason to believe that the framers of the Acts of

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1839 and 1861, when they speak of tenants by prescription, had in view, persons who derived their title from long and uninterrupted possession, yet as there was no argument on the subject at the bar and no authorities referred to, I do not feel myself at liberty to pronounce an opinion on the first question in the case, viz., whether the defendant is a tenant by prescription. But in the view which I have taken of the other questions submitted for the opinion of the Court, it is in fact unnecessary to express any opinion on the point.

The second and third questions in substance come to this, whether, as a prescriptive tenant or not, the defendant is liable to have the payment due in respect of the lands occupied by him as stated in the special case, commuted by the Governor. And this question depends on the construction of sections 3 and 4 of Act XXVI. of 1861. The preamble of this Act recites the expediency of removing all doubts as to the power of Her Majesty to convey in fee simple in the district of Malacca, the lands which certain rights and interests were surrendered to the East India Company in the years 1828 and 1829, and of otherwise amending the law relating to the occupation of land in Malacca. The first section then goes on to provide that the lands in the district of Malacca, in which certain rights and interests were surrendered to the East India Company in the years 1828 and 1829, on condition that a certain amount then settled and agreed upon shall be paid by the Government annually, so long as the British rule in the said district continued, to every person making such surrender, and on condition also that every such person, in the event of the cessation of the British rule in the said district, should resume the rights then conditionally surrendered to the British Government, are hereby vested in Her Majesty the Queen, her heirs, &c. [*saving always any rights or interests lawfully vested in any under-tenants or cultivators holding or occupying any portion of such lands*].

The first object, therefore, of the Act of 1861 was to set at rest all doubts as to the right of the Queen to convey in fee simple in Malacca, and to free the land from the clause which declared that in the event of the cessation of the British rule there, the original proprietors should resume the rights which they had transferred. And this object seems to me to have been expressed in clear and unmistakable words in the first section of the Act, reserving, however, the rights of actual tenants.

The third section deals with the cases of tenants, and declares the cultivators and resident tenants referred to in the first section of the Act, as well as in the district of Nanning, who hold their lands by prescription to be subject to a payment of one-tenth of the produce thereof to the Government; *such payment to be made in kind, or in the form of a sum of money fixed in commutation of the payment in kind*; and the section then provides for the manner in which all other cultivators and under-tenants of lands in the district aforesaid are to be assessed.

It is observable that the third section declares prescriptive tenants to be liable to a payment of a tenth in kind or of a sum of money commuted for the tenth in kind, and the fourth section

then prescribes the manner in which this commutation is to be made. The fourth section enacts that it shall be lawful for the Governor of Prince of Wales' Island, Singapore and Malacca to commute the payment *whether in kind or money*, to which any person is liable under the third section, for a sum to be fixed at the discretion of the Governor, and for an annual quit-rent.

Now it is impossible to doubt the meaning of this section. It is to give the Governor the power of commuting the payment *whether in kind or money* to which any person is liable under the third section of the Act, and therefore power to commute the payments due from tenants by prescription.

It certainly does strike me as singular, that the right to fix the amount to be paid by the tenant by way of commutation should be vested in the Governor solely, and that the tenant should have no voice in the matter. And it is easy to conceive cases in which the exercise of this right might work injustice. But I am bound to take the Act as I find it, and I confess, I cannot arrive at any other conclusion than that the Governor has power in his discretion, to fix the rate at which the payment in kind due by any tenant by prescription shall be commuted.

From the special case, it appears that the Governor has commuted the payment to which the defendant was liable for the occupation of his lands for a money payment of one cent, and a yearly quit-rent at the rate of twenty-five cents per acre, and as this commutation has been made in the manner prescribed by the fourth section of the Act of 1861, and there is no suggestion that the rate is excessive, I am of opinion that, whether the defendant be a prescriptive tenant or one of the "other cultivators and "under-tenants" referred to in the third section, the commutation is equally valid, and that he is bound to pay the Government the sum now rated for dollars 44.85½ yearly at the end of every year, so long as the said commutation may remain in force.

Judgment for the plaintiff.

BEMBEN v. CURPEN KEECHEE.

Seemle. If an action has been tried in the Court of Requests, and judgment given therein, such judgment is binding on the parties, and they cannot afterwards come into the Supreme Court about the same claim, even if plaintiff was merely non-suited in the lower Court.

This was an action of detinue for certain cows, &c. The defendant simply pleaded the general issue, and at the trial, in person, adduced evidence denying the plaintiff's property in the cows.

Bond on behalf of the plaintiff, objected to the evidence, and contended that by the Rules of Court such evidence could not be given under the general issue.

[*Hackett, J.* Yes, but I don't suppose you will press it in this case.]

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In the course of the case it appeared that the Commissioner of the Court of Requests had tried a case between these parties for the very same things now claimed, in which the plaintiff lost his case.

[*Hackett, J.* If this case has been already tried in the lower Court, and the defendant has obtained judgment, I will not entertain this suit, as the judgment there is binding on the parties. Supposing a plaintiff sued in the County Court and lost, could he afterwards sue in the Superior Court?]

I submit he could, if he was only non-suited. A non-suit is no bar to an action being retried.

Hackett, J. I think not; if he was non-suited, he should sue again in the same Court.

It afterwards turned out that the case was not regularly tried in the Court below, and the plaintiff had judgment. [a]

COOMARAPAH CHETTY v. KANG OON LOCK.

PENANG.

HACKETT, J.
1872.

June 19.

The Lord's Day Act, 29, Car. II. c. 7, as far as contracts are concerned, applies to both Christians and non-Christians in this Colony.

Borrowing money and giving a note for it, even by a tradesman, is not a thing done in the course of his ordinary calling; but it would be otherwise, if given for good sold according to the ordinary calling of the vendor.

To a plea stating that a note was made on Sunday, the plaintiff replied, that after making the note, the defendant promised to pay.

Held, on demurrer, that it was bad.

Semble. The penal portion of the Act does not apply.

Declaration on a promissory note. Summons issued under Act V. of 1866.

The defendant, having obtained leave to appear and defend, pleaded *inter alia*, the following plea:—

“And for a third plea, the defendant says, that before and at the time of the making of the promissory note, and promise of the defendant in the declaration mentioned, he, the defendant, was and still is a tradesman, carrying on his business in China Street in George Town, in Penang, under the firm “or chop of “Teng Thye,” and that the said promissory note and promise in the declaration mentioned, was signed, and made, and completed by the defendant on a Sunday, to wit Sunday, the 10th day of March, in the year of Christ, one thousand eight hundred and seventy-two [b], and that the same was signed, made and completed by the defendant. In the exercise of the worldly labour, business or work of the ordinary calling of the defendant as such tradesman as aforesaid, and that the same was not a work of necessity or charity; and that the 9th day of March, 1872, therein mentioned, was only inserted at the plaintiff's request, as he was afraid he could not recover the monies due thereon, if the proper date was inserted; wherefore, the

[a] See *Routledge v. Hislop*, 29 L. J. M. C. 90. If a case has once been decided by the Court of Requests, no appeal lies to the Supreme Court from such decision. *Maxwell Prac. of the C. R.* page 7, *Maxwell on Magistrates*, p. 34. The procedure is laid down by sec. 10 of the Appeals Ordinance XII. of 1879.

[b] The Court is bound to take judicial notice that a particular day of the month falls on a Sunday. *Hanson v. Shakelton*, 4 Dowl. 43.

"defendant says, that the said promissory note and promise in the declaration **HACKETT, J.** mentioned, was, and is void in and by the law." 1872.

The plaintiff demurred to the plea, the marginal note of the demurrer being as follows:—

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"A matter of law intended to be argued, is, that so much of the Statute, "29. Car. II. c. 7, as relates to the observance of the Lord's Day, does not "apply to Chinese, Mahomedans, or Hindoos, being non-Christians residing in "this Colony."

The plaintiff also replied to this in the words following:—

"And for a second replication to the defendant's third plea, the plaintiff "says, that after the making, signing, and completing of the said promissory "note and promise, to wit on the 10th day of April, 1872, the defendant paid "the plaintiff, the sum of dollars thirty-three [\$33] in part payment of the "said promissory note, and in part performance of the said promise, and that "thereafter, to wit, in the commencement of the month of May, 1872, the "defendant verbally promised to the plaintiff, to pay to the plaintiff, the sum "due on the said promissory note and promise aforesaid."

The defendant demurred to this replication, the marginal note of the demurrer being as follows:—

"A matter of law intended to be argued is, that part payment or an ex- "press promise as herein alleged, can give no original right of action, if the "obligation on which it is founded, [in this case the illegal promissory note "and promise,] could never have been of itself enforced."

The plaintiff joined in demurrer.

Bond, for the plaintiff. The first question in this case, is, whether the Statute 29 Car. II, c. 7 extends to the Straits or not, if it does not, then there is no necessity to go into the other demurrer. By this Statute, men are to occupy themselves in religious duties. I submit this Act is not applicable, it is impossible to carry out its provisions here. At the settlement of the Colony, English Law was imported, but this was only the common law, and such Statute law as are applicable. It is absurd to say it does extend.

[*Hackett, J.* It has never been in force, the shops here, I believe, are always open.]

Yes. In fact, if it applied, it would create a great field for information. In *Forsyth's Opinions on Constitutional Law*, p. 2, in talking of *Nova Scotia*, and as to what Statutes apply to a Colony, it is laid down, that Statute Laws are imported into a Colony according to circumstances, charter, or usage. Our charter, says nothing as to this, and there is no usage or circumstance by which it might be said, that the Act is applicable. The non-Christians carry on their business on Sunday, and there is no Act of the Legislature to support the Lord's Day Act. In page 18 of the same work, it is said, the Common Law of England is applicable to the Colonies, but as regards Statutes is a question of fact, and depends on circumstances. This Act is, by reasonable construction, inapplicable. In *The Mayor of Lyons v. The East*

HACKETT, J. *India Co.*, 2 Moore P. C. C. 472, it was held that such law only extended, as were applicable to the place. According to the language of Lord Brougham in that case, the Lord's Day Act is manifestly inapplicable to this Colony. In *The Advocate-General of Bengal v. Ramasormay Dorsee*, 2 Moore P. C. C. 22, the law of *felo de se* was held to be not applicable to India. Sir Barnes Peacock in that case, says the charter not necessarily determines the law of the place. The religion of the different races, being at variance with the English Law, the Court has allowed it to prevail. The judgment of the Calcutta Supreme Court was upheld by the Privy Council in this case. The inference, therefore, would be, that such laws as are inconsistent with the custom of the population here, are altogether inapplicable. In the case of *Abraham v. The Queen*, decided in Calcutta in 1868, on appeal from the Rangoon Court, and reported in 1 B. L. R. App. Cr. p. 17, it was held, that the Lord's Day Act did not extend in Criminal Cases to British Burmah. In Maxwell on Mag. [2nd Ed.] p. 187, it is stated, that the religion of the non-Christians here, made way for the law to be suspended in their favor, and it would be unjust to apply Acts relating to Christians to non-Christians. This is a very strong passage, and it would not be contrary to public policy to hold, that the Statute is not applicable. In England, it is hard to enforce this Act, and they are talking of repealing it. I submit on the authorities, that the Lord's Day Act is not applicable to the Straits; its provisions cannot be enforced, and if it could even, it would affect the largest portion of our community.

C. W. Rodyk, for the defendant. The plea is good. The only question is whether the Lord's Day Act extends here. If it does, the plea is good. It is submitted that the Act does extend. In *Abraham v. The Queen*, 1 B. L. R., App. Cr., p. 17, which was decided on a case stated by the Rangoon Recorder, the Recorder takes it for granted, that the Act extends to Civil suits, but not to Criminal ones. Sir Barnes Peacock, who delivered the judgment says, that the Act is not applicable to criminal cases, but says nothing as to civil suits. The inference, therefore is, that the Act applies to civil suits. In Noordin's Will case [a], your Lordship in citing Lord Kingdon's judgment says, that the natives partake of the English Law, and also, that by the charter, all who settle here become subject to that law, and the natives cannot be held exempt, there being nothing in our charter exempting them, as is the case with the Indian one. It is strange, that neither charters, or Ordinances, make any provisions for the natives, it was therefore, evidently intended that the *lex loci* was to extend to all; if this was not intended, there would surely have been a special provision for it. There is also a case of *Mohindronauth Mitter v. Kysolauth Bannerjee*, 1 Coryton's Rep., p. 1, where it was held that holidays and festivals affect contracts. Unfortunately, no one has these reports, but there is a note of this case in Cowel and Woodman's Indian Dig. p. 337. I submit this case must be entirely governed by the law merchant, and not by the religion of the different peo-

[a] *Fatimah & ors. v. Logan & ors.*, ante p. 255,

ple. The passage from Maxwell, is inapplicable, that only refers to divorces, marriages, &c., but not to the law merchant. In *Byles on Bills of Exchange*, 224, it is stated, the law merchant respects the religion of the different people. All the cases cited by the other side relate to, and affect the religion of the different races, but not contracts. Lord Ellenborough, in *Taylor v. Phillips*, 3 East, 155, says, that it would be against public policy not to carry out the provisions of the Lord's Day Act. On the whole then, I submit, the Statute applies.

Bond in reply. It is absurd to say this Act extends.

[*Hackett, J.* Is your contention that the Act does not apply at all, or not to natives only.]

The demurrer only states that it does not apply to natives. Steamers are constantly coming in and going out on Sundays.

[*Hackett, J.* That will not affect the question.]

I go further, the Act does not extend at all.

[*Hackett, J.* In London, the greatest city in the world, work is stopped till Monday morning.]

Yes, but it is a great hardship on them, and the agitation now is to have this Statute repealed altogether. It is impossible to enforce the Act against Roman Catholics. I submit on the whole the condition of the Colony, will not allow this Act to extend, except with great hardship.

[*Hackett, J.* How do the natives manage on Sundays and holidays, there is no Court?]

There are express rules as to the Courts. Sir Benson Maxwell in his work on Magistrates says, it is absurd for Chinese, &c., to repair the parish Church. I admit the law in Noordin's case is sound law, but submit it is not applicable to this case.

[*Hackett, J.* The question here is, first, whether the Act extends generally, and second, if so, then does it extend to the natives.]

In a case in Merivale's Reports, the Mortmain Act was held not applicable to the Colonies. [a]

[*Hackett, J.* If a Colony is composed solely of Europeans, surely it is applicable.]

This Act is not applicable to Mauritius.

[*Hackett, J.* Why not?]

Because they are mostly Roman Catholics, who do not observe the Lord's Day throughout, they go and enjoy themselves on that day.

[*Hackett, J.* I believe that is the practice, but it is not sanctioned by the Church. There is a great difference between working and enjoying yourself. What are the words of the Act—Is the Bank within the Act?]

I submit not.

[*Hackett, J.* A farmer is not within the Act. *Reg. v. Silvester*, 33 L. J. M. C. 79.]

If the Act was held to apply, then people cannot cross over to the Province, or from the Province here, except they get a cer-

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[a] *Attorney-General v. Stewart*, 2 Meriv. 163.

HACKETT, J. tificate from a Justice of the Peace. I submit the Act is altogether inapplicable.
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Bond. The second question turns on a demurrer to the 2nd replication to the 8th plea. I submit that a subsequent promise to pay is binding, although the original agreement be void. *Williams v. Paul*, 6 Bing. 653. Here assuming the Act applies, and the note was made on a Sunday, I submit, the subsequent promise made it, binding.

[*Hackett, J.* That was on a *quantum meruit*. You do not say that the defendant kept the money.]

No, but we state he paid part. Defendant does not deny the note, but pleads exoneration and discharge. It may be taken for granted that money was paid.

[*Hackett, J.* There is no allegation in the declaration that money was paid, nor are the money counts inserted.]

The declaration is in the usual form in actions under Act V. of 1866.

[*Hackett, J.* It would make a great difference if the money counts were inserted; it would have been a *quantum meruit*. In the case cited, the animals were retained.]

I would ask to be allowed to amend the declaration by inserting the money counts.

Rodyk. In actions under Act V. of 1866, there is no declaration until defendant appears, and the money counts ought, then, to have been inserted in the declaration.

Bond. By the rules of Court, I might amend.

[*Hackett, J.* You ought to have inserted the money counts when you filed your declaration.]

Rodyk. I consent to the amendment asked for, on being allowed to put in a special plea, thereto.

Plaintiff allowed to amend as asked for.

July 3rd, the petition having been amended, and the facts of the case heard,

Bond, for the plaintiff.

The replication, I submit, is good. The case of *Williams v. Paul*, 6 Bing. 653, is exactly in point. Some doubt was thrown on this case by Baron Parke in the case of *Baron Simpson v. Nicholls*, 3 M. & W. 244, but I submit that will not affect its weight in this case. The evidence brought forward failed to shew that this promissory note was made in the ordinary calling of the defendant. The defendant is a rice shop-keeper, and his ordinary calling is to sell and buy rice, and to enter into contracts for that purpose.

[*Hackett, J.* In both the cases cited, the defendant entered into the contract in his ordinary calling.]

A bill drawn on a Sunday has been held not to be void. *Bigbie v. Levi*, 1 C. & J. 180.

[*Hackett, J.* In that case, the bill was dated on a Sunday.]

I submit the plaintiff is not within the statute, he is not a tradesman, but a money-lender. He is a trader, not tradesman.

[*Hackett, J.* Is a merchant a tradesman?]

It is difficult to say what is a tradesman.

[*Hackett, J.* A tradesman, is a carpenter, shoemaker, tailor, or some such person. It seems the Act only applies to the inferior grade.]

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Yes, it does not seem to have struck the people of the time of Charles the Second, that the Act did not apply to the higher grade of life. An Attorney is not within the Statute, and I doubt whether a merchant is. The Statute does not apply to a stage coach-driver. *Sandiman v. Breach*, 7 B. & C. 96. The Statute does not apply unless the contract was entered into in the course of a person's ordinary calling. Hiring a boy for the year by the farmer is not within the Statute, *Rex v. Whitnash*, 7 B. & C. 596. The defendant did not enter into this contract in his ordinary calling, he like other persons had to borrow money if he wanted it.

[*Hackett, J.* I don't see how borrowing money is the ordinary calling of a man.]

Giving a guarantee is not in the ordinary calling of a man. *Norton v. Powell*, 4 M. & G. 42. Sending a mare to a farmer to be covered by a stallion, which was accordingly done on a Sunday, is not within the Statute, it not being done by the farmer in the exercise of his ordinary calling. *Scarfe v. Morgan*, 4 M. & W. 270. On these authorities, I submit, that the borrowing of money on a Sunday, is not within the Statute.

[*Hackett, J.* The note would have been made in the ordinary calling of a man if, for goods sold on a Sunday.]

Here the defendant is simply borrowing money, for what purpose, is unknown to the plaintiff. If the note was made on a Sunday, that would not be enough to bring it within the Statute, it must be made in the ordinary calling of the man. Further if made on a Sunday, and in the ordinary calling of the defendant, yet the subsequent promise to pay revived it.

Rodyk, for the defendant. It has been admitted by the other side, that the ordinary calling of the plaintiff, is to lend money.

[*Hackett, J.* You do not state in the plea what the plaintiff's ordinary calling is.]

No. The principal case quoted, and relied on by the other side is, *William v. Paul*. This case, if not altogether overruled, has been greatly doubted and shaken in the case of *Simpson v. Nicholls*. The latter part of the latter case has been wrongly reported, and in a note to this case in 5 M. & W. 702, it is stated, that it is doubted whether the case of *Williams v. Paul* can be now considered good law. There is a direct contradiction of the cases cited by the other side, and as *Simpson v. Nicholls* is a subsequent case, I submit, it must be followed. The second count cannot assist the replication, as it is to the third plea to the first count. [a]

[a] "You cannot transfer to one part of the Record, what is stated in another." *Booth v. Howard*, 5 Dowl. P. C. 438; *Dempster v. Parnell*, 3 M. & G. 375; *McDougal v. Robertson*, 4 Bing 441; *Lockwood v. Nash*, 18 C. B.; 536; *Hyde v. Watts*, 13 L. J. Ex. 41.

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[*Hackett, J.* I will not trouble you any further on the point, there is no evidence of a subsequent promise to pay.]

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Hackett, J. This is an action on a promissory note, and the defendant has pleaded several pleas. The 1st is an express exoneration and discharge. This plea was not proved. The 2nd is an exoneration and discharge before breach, this plea was also not proved. The third plea is as follows, [reads it.] To this plea, the plaintiff has demurred. It is not contended on the plaintiff's part, that the Act does not apply at all, but only not to Mahomedans, Hindoos, and Chinese. I confess, I find it difficult to hold, if the Act extends, these persons exempt. It is extremely inconvenient to hold a general Act of this kind not applicable to some, as questions might arise between Christians and non-Christians. In India, it has been held in a case cited by Mr. Rodyk, that the non-penal portion of the Act is in force; at least that is the inference from it. The case stated by the Rangoon Recorder, states, "Assuming that 'the Lord's Day Act was in 1863, a part of the law administered 'in the High Court at Fort William in its ordinary Civil Jurisdiction, I do not think that it applies therefore in a Criminal Appeal 'in the Recorder's Court in Burmah.'" This case assumed that the non-penal part of the Act was law in India, and nothing was said about this, by the Calcutta Court. No doubt, as far as Christians are concerned, it is very proper that the Act should be in force. Even before the Lord's Day Act, the common law made some things void, and the Act was only for "the better observing 'of the Lord's day.'" For instance, if I sat on Sundays, it would be void. On the ground of public policy, the Act ought to be held in force in all British Colonies, it is only difficult to enforce it against the natives. It would be hard to hold the penal provisions in force, but here, we are considering its effects on contracts simply. The general rule on the question of how far English law applies to the different classes within British territory, was laid down by Lord Kingsdon to be binding on them as far as applicable. In accordance with this, I held in a recent case [a], that the English law was imported into Penang at the time it was colonized, and such law was applicable to natives, and I see no reason why the proper observance of the Lord's Day, should not apply to a Colony under the British Crown. I think, it is the duty of every Christian Government to provide, as far as outward appearance goes, the proper observance of Sunday. I hold this simply with respect to contracts. I don't say the penal provisions apply any more than they do to India.

There is no doubt, it will be extremely difficult to say, how the Act can be enforced here. I dare say, if the penal portion extended, there would be a general disturbance here, as I believe, all natives work, and open their shops on Sundays. As regards the evidence, the defendant has not made out the note to have been signed on a Sunday. The note is dated the 9th March, and *prima facie* the date of the note is the day on which it was made. If this is disputed, the clearest evidence is necessary. The de-

[a] *Fatimah & ors. v. Logan & ors.*, ante p. 255.

defendant's evidence is altogether unsatisfactory, and there is a great conflict of evidence. The defence deny the plaintiff is Coomarapah Chetty, it is impossible to reconcile the evidence, but the plaintiff is more borne out, and the evidence clearly shews he is Coomarapah Chetty. The defendant says, the plaintiff offered the money, went away, and returned with it and a promissory note, he remonstrated as the proper date was not inserted, that the plaintiff said, it would be void, if dated on a Sunday, and he accordingly signed it. This is an improbable story. Although the Chetties might know something of the law, yet it is impossible for them to be so well versed in the law as to know this. The last witness for the plaintiff entirely contradicts the defendant's story. It is not necessary to consider whether the note was made in the ordinary calling of the defendant, but I may say, that the evidence does not shew that it was made in his ordinary calling. The case in Barnewall and Creswell's Report, cited by Mr. Bond, shews that to be the ordinary calling, it must be done frequently, usually, or daily. It is not necessary or absolutely essential to borrow money for purpose of trade. If the note was given for goods sold according to the "ordinary calling" of the person, then it would be otherwise. It is impossible to say, this note was made in the "ordinary calling" of the defendant. As regards the replication demurred to, I am disposed to think that the promise is void, and the replication bad. It would be monstrous to hold the greater portion of the Act applicable, and it is difficult to draw the line.

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Judgment for plaintiff. [a]

MAH KEOW [BY HER NEXT FRIEND CHE EM.]

v.

CHEAH HIT *alias* LOW TWAY & ORS.

If a person is aware he is under 21 years of age, but is ignorant at what age infancy by law ceases, and in such ignorance enters into a contract with another without disclosing the fact of his being under 21, this is not such a fraud on his part, as will estop him from applying to a Court of Equity to set aside such contract.

The defence of being a purchaser for value, without notice, is not available unless specifically set up by the plea or answer.

PENANG.
HACKETT, J.
1872.
July 1.

This was a suit in Equity by Mah Keow, an infant, seeking to have a certain deed of mortgage, signed by her, and mortgaging her land to the defendant, set aside. The grounds on which this was sought were, that fraud and duress had been practised and brought to bear on the plaintiff, by the second and third defendants; and, at the time she executed the deed, she was an infant, under 21 years of age. The defendants, in their answer, denied fraud and duress, as well as the plaintiff being at the time an infant

[a] See further as to the replication, *Wms. Per. Pro.*, p.p. 71, 72; *Bos. & Pal.* 252; *Lloyd v. Lee*, 1 Str. 94; *Cockshot v. Bennett*, 2 T. R. 763; and contra, *Flight v. Read*, 32 L. J. Ex. 265; *Earle v. Oliver*, 2 Ex. 89, per Parke B. See, however, the judgment of Martin B., in *Flight v. Read*, who dissented from the rest of the Court.

HACKETT, J. It appeared that the second and third defendants were husband and wife, and the second defendant was also the elder sister of the plaintiff; that the second and third defendants were in want of money, and requested the plaintiff to execute, with them, a deed of mortgage to the first defendant for \$300, mortgaging her one half share of the land which she owned jointly with the second defendant, and which she also then mortgaged. By the deed conveying the land to the plaintiff and her sister, the second defendant, each of them had a life interest, with a contingent interest in the share of the other of them, on her decease. The plaintiff maintained that the whole of the money received on the mortgage was taken by the second and third defendants. They, on the other hand alleged that a part of the amount borrowed namely, \$98.50, was received by the plaintiff. The evidence of the plaintiff's being under 21, was clear; that of fraud and duress on the part of the second and third defendants was very weak: there was no evidence whatever that the first defendant knew of the fraud or duress, or of the plaintiff being, at the time, an infant.

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Bond, for the defendant, contended that the plaintiff had altogether failed to make out her case, and that even if what she had tried to prove was true, yet it could not affect the first defendant, who was the chief defendant in the suit, and whose interest was alone affected, as there was no evidence of his participating in the fraud, or duress, or knew that the plaintiff was an infant at the time; and further, that, even if the first defendant had notice of the plaintiff's infancy, yet the Court would not assist her, for, according to the defendants evidence, which was more to be relied on than the plaintiff's, she had derived a benefit by the mortgage.

C. W. Rodyk, for the plaintiff, contended that her case was clearly proved, and that the first defendants not having notice of the duress could not assist him; and as to the alleged benefit received by the plaintiff, he submitted on general principles, that even if she derived a benefit, which he submitted she did not, still it not being for necessities, could not bind the infant, and even in a Court of Equity an infant could avoid his or her contract although he or she derived a benefit by it, and cited *Sm. Man. of Eq.* 68. [10 *Ed.*]

[*Hackett, J.* The plaintiff knew she was an infant and yet contracted the debt, did she not thereby commit a fraud on the defendant Low Tway?]

C. W. Rodyk submitted that though the plaintiff knew she was not 21, yet she did not know at what age, a person was no longer considered an infant by the English law, and therefore, she had not, committed a fraud on the defendant named.

Cur. Adv. Vult.

September 19. *Hackett, J.* In this case plaintiff made a mortgage of her property, in which she had a life interest, and she has now come into Court and asks to have this mortgage deed set aside. She alleges, that about four months before the suit was commenced,

the defendant Poh Oh being in embarrassed circumstances, together with his wife, the defendant Nem Boey, asked her to execute, together with them, a certain paper-writing mortgaging her lands; but she refused to comply with this request, and thereupon the defendant Poh Oh beat and assaulted her, and then, with force compelled the plaintiff to leave her residence, and then brought her to town to the house of one Mungoh, where the defendant Cheah Hit was at the time, and there all three of the defendants compelled her to sign and seal together with the defendants Poh Oh and Nem Boey, the aforesaid deed of mortgage, which she did through fear, and against her will and consent. But the evidence does not bear this out. The plaintiff entirely failed to make out the duress. Mr. Aeria, and the other of the witnesses, all say the plaintiff signed the deed willingly, and did not appear to have been forced to do so. On the whole, I think, she has failed to establish her case for relief on this ground, but the plaintiff also says she is an infant, and the deed on that account is voidable or void, and must be set aside. The law is clear, that an infant is incompetent to enter into any contract, and may at any time apply to set it aside. The defendant Cheah Hit does not set up that he was defrauded, and has not pleaded that he was a purchaser for valuable consideration, without notice; and according to strict law, a person is not entitled to that privilege, unless he pleads it. [a] But in this case, no actual fraud on the plaintiff's part was proved, to entitle the defendant Cheah Hit to retain the mortgage. It has been held, that if an infant, knowing that he is one, enters into a contract, but conceals the fact that he is an infant, and stands by, he will not afterwards be allowed to set up such infancy, to set aside the contract [b]; but where he is ignorant of the fact at the time, and remains quiet, by which the person with whom he contracted is nevertheless deceived, still he can apply to set aside the contract. In this case, I think, there was no fraudulent intent. The plaintiff, no doubt, knew at the time, she was under the age of 21 years, but did not know at what age a person attained his or her majority; and probably did not know it would have made her deed bad, or what the effect of it on the deed would be.

I dare say, the greater part of the natives here are not aware of the effect of infancy on a contract; and I, therefore, think, she is not disentitled to set aside the mortgage as far as she is concerned. It is a hard case on the defendant Cheah Hit, but as the defendant Poh Oh and Nem Boey have a contingent interest in the land mortgaged, he is entitled to retain that as a continuing security. The deed, therefore, as far as plaintiff is concerned must be cancelled.

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[a] See *Phillip v. Day*, 31. L. J. Ch. [N. S.] 321.

[b] See *Nelson v. Stocker*, 28 L. J. Ch. [N. S.] 760., *S. C. 4 De Gez v. Jones*, 458.

SHAIK LEBBY v. FATEEMAH.

PENANG.

HACKETT, J.
1872.

July 2.

The boundaries and abutments of a piece of land mentioned in a deed, are the only things by which a person must be guided in ascertaining the land: and parol evidence, to shew that the boundaries are wrong, and to contradict the deed, is inadmissible; even if in and by the deed itself, the area of the land agrees with the story of the person who wants the evidence admitted.

Land set aside by a deed as Wakoff, for the burial ground of the donor, and his family and relations, is not a charity, as it is not for the benefit of the public, and is therefore void. The Indian Cases to the contrary are no authorities here.

This was an action in ejectment. The defendant relied on a deed of prior date to the conveyance relied on by the plaintiff, by which the lands were set aside as Wakoff, for the burial ground of the donor, and her family and relations. The defendant was the daughter of the donor.

C. W. Rodyk, for the defendant. The land was dedicated as a burial ground. The plaintiff had not only constructive, but actual notice of this. Such lands cannot be sold. The deed I submit, created a charity, and such a charity as is recognised by the English Law, *Broom's Legal Maxims*, p. 18-21. *Parry v. Jones*, 1. C. B. [N. S.] 345. Plaintiff having notice of the charity, takes subject to it. *Sm. Man. of Eq.* 100. It might be said that the deed appoints no trustees, but this being a charity, a Court of Equity will assist it: *Sm. Man. of Eq.* 168; but I submit the deed sufficiently appoints a trustee. Wakoff land cannot be sold, and it is not necessary to use the word Wakoff in creating such a charity. *Jewin Doss Sahoo v. Shah Kubur-ood-deen*, 2, *Moore Ind. App.* 390. The cases mentioned in 1, *Morley's Ind. Dig.* 554, and 3 *Morley's Ind. Dig.* 353, clearly shew this is a charity, and the Court will, accordingly, support it. As to the boundaries, if the Court holds, that parol evidence is inadmissible to contradict them, then I submit the area of the land mentioned in the deed is to guide us.

Ross, for the plaintiff. The boundaries alone are to guide us. If they are wrong, defendant can resort to a Court of Equity, but then even, I submit, she would get no relief. *Sugden Vendors and Purchaser's* [14th ed.] 171; *Harvey v. Wood*, 2 Vesey, 195. First, admitting the deed is good, I submit this is no charity. To be a charity, it must be something by which the public derive a benefit. *Boyle on Charitable Uses*, 49. Here the burial ground is not for the public, but for the donor and his family. The authorities are very conflicting on this point. A sum of money given in trust to keep up tombs of donor and family was held in *Thompson v. Pritchard*, 3 M. & S. 410, in the King's Bench, to be a charity; but in a subsequent trial of the same case in the Common Pleas, reported in 6 Taunt, 370, the contrary was held by C. J. Gibbs. He there says he holds it in accordance with the opinion of the King's Bench, although he was mistaken in this, yet we have his opinion on the point, and as this is a subsequent case, I submit it must be followed instead of the other. [a] Secondly. The deed is bad. No trustee is appointed. The passage from Smith is very general, but it must be taken only when there actually is

[a] See *Choa Choon Neoh v. Spottiswoode*, ante p. 216.

an appointment or an intention to appoint a trustee. This is clearly laid down in *Boyle*, 237. In this case there is no appointment or intention to appoint a trustee.

[*Hackett, J.* Does not the deed appoint trustees? I think it clearly shews who are trustees.]

HACKETT, J
1872.

SHAIK LEBBY
v.
FATEMAH.

The children there named are the *cestui que* trust and not the trustees; they alone are beneficially interested. This is not a charity, to be a charity, it must be a public burial place. I submit on the whole that the deed is bad, and that this is no charity.

Hackett, J. I think the plaintiff has made out his case. The description and abutments must solely guide us, and clearly shew the land belongs to the plaintiff. It was said by the other side that this was a mistake. But if so, they must resort to a Court of Equity and not one of law. The defendant cannot adduce parol evidence to contradict the deed. [a] It was also said that the defendant claims through a deed of prior date to the one through which the plaintiff claims. That is the case, but I think the deed does not create a charitable trust. A great many cases decided in India were cited by Mr. Rodyk, but these cases are no authority here; as they were decided on the Mahomedan law which is not in force here. I must decide this case by the English law which I had occasion in *Noordin's Will* case [b] to look up, and by that law, though it is difficult to reconcile the cases, yet the subsequent cases shew, that to be a charity, it must be for the benefit of the public. Money given in trust to keep up tombs of donor and family, has been held to be no charity. [c] On these grounds, I think, the plaintiff must have judgment, though I am sorry for it. At the same time, I must say that, I think, he had notice that this was in Mahomedan point of view, sacred ground, and if he were a good Mahomedan he would give it up, but he is not now acting as a conscientious man.

Judgment for Plaintiff [d].

NAIRNE v. TUNKU MUDA HUSSAIN,

In re TUNKU OOSMAN v. NAIRNE.

The Court will not order the defendant [Executive-Creditor] in an Interpleader suit, although a bankrupt, to give security for costs.

PENANG.

Query.—Will the Court order a plaintiff, who is resident within the jurisdiction of the Court, and is a bankrupt, to give security for costs, whether he sues on behalf of the trustees or otherwise; and if he sues on behalf of the trustees, will they be ordered to give security for costs.

HACKETT, J.
1872.

July 11.

Bond, on behalf of Tunku Oosman, the adverse claimant in an interpleader suit, having obtained a *rule nisi* on the defendant

[a] But see *Skipwith v. Green*, 1. Stra. 610. *Jack v. McIntyre*, 12 Cl. & Fin. 151. *Manning v. Fitzgerald*, 29 L. J. Ex. 24, & Roscoe's N. P. Ev. 22 [12th ed.]

[b] *Fatimah & Ors. v. Logan & Ors.* ante p. 255.

[c] This very point was decided in *Ong Cheng Neo v. Yeap Cheah Neo & Ors.*, post p. 326.

[d] See further *Scruton v. Brown*, 4 B. & C. 435, 1, Stephen's Commentaries, 441; *Dodd v. Burchall*, 31. L. J. [N. S.] Ex. 364; *Garrard v. Tuck*, 18 L. J. C. P. [N. S.] 338, as to the boundaries and area, and evidence to contradict the deed with respect to them.

HACKETT, J. [Nairne] in such suit, who was the execution creditor of a third party [Tunku Muda Hussain],

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Ross, on behalf of such defendant shewed cause. We are not bound to give security for costs, although we might be in insolvent circumstances. This has been decided by a large number of cases, *Macornal v. Johnson*, 1 East, 431; *Webb v. Ward*, 7 T. R. 756; 1 Tidd's Prac. 446, 537, citing *Sutton v. Sutton*; *The United Ports and General Insurance Company v. Hill*, 5 L. R. Q. B. 395; *Denson v. Ashton*, 4 L. R. Q. B. 490; *Sykes v. Sykes*, 4 L. R. C. P. 645.

[*Hackett, J.* This last named case is against you, and is precisely the same as the present one.]

Yes, but the subsequent case decided by C. J. Cockburn, *Denson v. Ashton* is different. The plaintiff here is suing to pay his creditors, and is not, nor are the trustees, I submit on the authorities cited, liable to give security for costs.

Bond, in support of the rule. The only case that is cited against us is *Macornal v. Johnson*, and that case turned on a particular Statute. The plaintiff is suing for his creditors and trustees, and the other authorities cited will not assist him. He is bound to give security for costs.

Hackett, J. You are not for the defendant, but for Tunku Oosman, the plaintiff, in the interpleader suit. If you were for the defendant, you might have some *locus standi*, but you are not now in a position to ask for security for costs. The rule will be discharged.

Rule discharged. [a]

ONG CHENG NEO v. YEAP CHEAH NEO & ORS.[†]

PENANG.
HACKETT, J.
1872.

July 24.

A testatrix made over to her executors "as such," all her estate "but in trust "always for the purposes hereinafter mentioned." She then disposed of various portions of the estate, and directed her executors to collect the remainder, and to apply and distribute the same, all circumstances considered, in such manner as to them appeared, just.

Held, there was no gift to the executors individually, but only upon trust; and inasmuch as the objects were not declared, the trust was void, and the property comprised therein went to the next of kin.

The testatrix also directed that the upper story of a certain house should be neither mortgaged nor sold, but kept as "a family residence." No time was mentioned during which the house was so to be kept, nor was the word "family," defined.

Held, the gift was void for uncertainty, and as tending to a perpetuity.

The testatrix also left four houses upon trust, to rent the same to two of her executors, for the period of 40 years, at \$100 *per mensem*, and to renew the lease from time to time,

Held, the trust was a good one.

She also directed a sum of \$50,000 should be lent to the said two executors for the term of 40 years, at 5 per cent. *per annum*, and to renew the loan from time to time: the interest she declared, should form part of her residuary estate.

Held, the trust was a good one.

She also directed that certain property should be held on trust, to allow one Lim Ah Yong to reside thereon, free of rent for 40 years, and that after that period, the property was to become his, or his heirs.

[a] See, however, *Doyle v. Anderson*, 2 Dowl. 596; *Andrews v. Morris*, 7 Dowl. 712, *per Coleridge J.*; *Elliot v. Kendrick*, 12 Ad. & E. 597; Anonymous, 1 Dowl. 300; *Mason v. Laithill*, 2 Dowl. 61; *Perkins v. Adcock*, 14 M. & W. 803; *Goalley v. Gunnart*, 24 L. J. [N. S.] C. P. 38.

* See Sup. a 4/75

Held, that the said Lim Ah Yong had simply a license to live in the premises, and **HACKETT, J.**
the gift over was bad, as violating the law against perpetuities. 1872.

She directed certain plantations to be reserved as a family burial ground, and that the same was not to be mortgaged or sold.

Held, the gift was void as tending to a perpetuity.

She also directed that a certain house was to be built on a portion of these plantations, to be called the "Sow Chong," and in which religious ceremonies to the dead were to be celebrated.

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Held, the trust was void as being a perpetuity, and not a charity.

Evidence of reputation of two persons being husband and wife, even among Chinese, is admissible on a question of marriage or no marriage, and is evidence of such marriage.

The above decisions, on appeal, affirmed by the Privy Council.

This was a suit for the proper construction of the Will of Oh Yeo Neo, deceased. The facts sufficiently appear in the judgment.

T. Braddell, [*Attorney-General*] for plaintiff.

B. Rodyk, [*D. Logan, Solicitor-General* with him] for defendants.

Hackett, J. This is a suit in Equity brought by Ong Cheng Neo, representing herself to be the sister and one of the next of kin of Oh Yeo Neo, a Chinese woman, who died in Penang, in July 1870, having previously made her Will, by which the defendants Yeap Cheah Neo, Khoo Kay Chan, Khoo Siew Jeng Neo, and Lim Cheng Keat were appointed her executors.

The testatrix, by her Will, devised and bequeathed, or in the language of the Will, "made over" to her executors all such property and effects as should belong to her at the time of her death, but in trust always, for the purposes thereafter, to be mentioned. The plaintiff maintains that several of the trusts declared by the Will, are bad in law and void, and, therefore, that the subject matters of these trusts are undisposed of by the Will, and formed the undisposed residue of the testatrix's estate, and as such, ought to be distributed among the next of kin of the said Oh Yeo Neo, according to the Statute for the distribution of Intestate's estates, and the object of the suit is to obtain a declaration of the Court to that effect.

The executors have put in their answer in which they maintain the validity of the trusts of the Will, and deny that the plaintiff is one of the next of kin of the testatrix. Lim Ah Yong and Wee Sah Neo, two legatees under the Will, have demurred generally to the petition for want of Equity.

The first question in the suit is raised by the third paragraph of the answer which is as follows:—"We deny it to be true that "the said Oh Yeo Neo left her surviving as her sole next of kin, "according to the Statutes for the distribution of the estates of "intestates, the plaintiff Ong Cheng Neo, her sister, and a niece "named Lim Choon Gek, and on the contrary, thereof, we say that "the plaintiff Ong Cheng Neo was not the sister, nor was the "defendant, Lim Choon Gek, the niece of the said Oh Yeo Neo "deceased, and further that they were not, nor was either of them "such next of kin at the time of the death of the said Oh Yeo

HACKETT, J. 1872. "Neo, deceased, and we claim the same benefit of this objection by way of defence, as if we had pleaded the said matters to the said petition."

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It is admitted that the plaintiff and the testatrix were children of the same mother, Cheah Tuan Neo, and the question at issue is whether Cheah Tuan Neo was married to Ong Sye, the father of the plaintiff, or whether she was only his concubine.

The evidence in support of the marriage is of two kinds—first, the evidence of persons who state they were present at the marriage ceremony; and secondly, evidence of reputation. Upon the first point several aged Chinese were called, who stated that they were present at the marriage of Cheah Tuan Neo to Ong Sye, about sixty years ago, and that they were always regarded as husband and wife, and as such were received in society. Many other witnesses were called by the plaintiff to prove reputation and, indeed, all the witnesses as well as those for the defendant, as for the plaintiff [with the exception of Khoo Seng Hap whose evidence was unsupported] concurred in saying that Cheah Tuan Neo was always treated with the respect due to a married woman, and was regarded as such. It also appeared in evidence that after the death of Cheah Tuan Neo, the plaintiff applied for Letters of Administration to her estate, and that, upon the hearing of the petition, the testatrix as the eldest daughter of the deceased, appeared, and herself applied for Letters, but that she subsequently waived her claim in favour of the plaintiff, thus implicitly acknowledging her legitimacy. The plaintiff also proved that the testatrix had procured a tombstone from China for her mother's grave, on which were inscribed the words—"Cheah Tuan Neo, her tombstone, son: Oh Kok Tean; daughters: On Yeo Neo, Ong Lim Neo, and Ong Cheng Neo," but there was no mention made of any husband. It is stated that it is unusual to put the husband's "seh" or tribe on the wife's tombstone, and the omission of it in the present case is accounted for as follows:—

Koh Teng Choon, the Chinese Interpreter of the Supreme Court states that when a woman has one husband, the name of that husband is inscribed, but if she has had two husbands, the name of the last husband is placed, if there is an agreement between the parties interested, but that if they do not agree, then the name of neither husband is placed. On the whole, I think, that if any inference is to be drawn from the inscription on the tombstone, it is favourable to the legitimacy of the plaintiff, as all the daughters are described in the same way, and no difference whatever is made between them.

The defendants contended that the evidence of the marriage is insufficient, and they rely on the following circumstances: first, that it is not stated by the witnesses of the marriage that any male relative gave the woman away; secondly, that Chea Tuan Neo was taken when dying from the house of the plaintiff to that of Oh Yeo Neo; and lastly, that at the funeral of Cheah Tuan Neo, the seh "Oh" [that of the first husband] was inscribed on the lanterns.

Now, in deciding the question of marriage or no marriage, in a case where there is evidence that the parties have passed as man

and wife for many years, it must be remembered that it does not merely depend on the greater or lesser weight of the evidence on one side, or on the other, or in the balance of evidence as to particular facts. In the case of marriage, there is always a presumption in its favour. *Semper presumtor pro matrimonio*. As Lord Lyndhurst observed in *Morris v. Davies* [5 Clark & Fin. 163.] "The presumption of law [in favour of marriage] is not to be lightly repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it, must be strong, distinct, satisfactory and conclusive."

In the *Breadelbane Case*, [1, L. R. Sc. & Div. App. 182] the connection of the persons whose marriage was in question was in its origin illicit, and yet the House of Lords held, that after many years cohabitation with the reputation of husband and wife, it must be presumed that they had been married, although, there was no evidence of an actual marriage. It is true, this was in Scotland, but there seems no reason why the same principle should not hold good, generally. As Lord Cranworth observed in that case: "By the law of England, and I presume of all other Christian countries, when a man and woman have long lived together as husband and wife, and have been so treated by their friends and neighbours, there is a *prima facie* presumption that they really are, and have been what they profess to be. If, after their deaths, a succession should open to their children any one claiming a share in such succession as a child, would establish a good *prima facie* case, by shewing that his parents had always passed in society as man and wife, and that the claimant had always passed as their child."

In the present case we have the fact of the marriage proved by witnesses, and even if the evidence of the performance of the marriage ceremony be considered not altogether satisfactory, yet there is clear evidence that, after the death of her first husband, Cheah Tuan Neo, lived with Ong Sye as his wife, and was regarded as such by all her relations and friends. The only evidence to contradict the evidence of reputation, extending over a period of about sixty years, is that, of the witness Khoo Seng Hap, who alleges that the deceased Yeo Neo spoke to him in terms of disapproval of the connection of her mother with Ong Sye, and called it a shameful affair, but as this is unsupported and is inconsistent with all the other evidence in the case, I don't consider it as worthy of credit.

The presumption which arises from the evidence of reputation extending over so long a period of time, I do not think is rebutted by the facts relied upon by the defendants. The evidence of the meaning and significance of Chinese customs, [such as carrying lanterns at a funeral] must be much clearer than it has been in the present case to warrant me in inferring from it the non-existence of a previous marriage, in opposition to the strongest evidence from reputation. When the status of marriage has subsisted for more than half a century, and children have been born who always held in the family, the position of legitimate members of that family, it appears to me, that it would be most dangerous to hold that status does not in reality exist, except on the clearest

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HACKETT, J. and strongest evidence. In the present case, I do not think such evidence has been produced, and I, therefore, feel bound to hold, that the plaintiff has established her rights as one of the next of kin of the testatrix.

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I now come to the construction of the Will.

The first question argued is, that which arises in the 15th clause of the Will, by which the testatrix directs as to the remainder of her real and personal property not already disposed of, that her executors shall receive and collect the same from all persons whatever, and in such manner as to them, may seem proper, and directs that they, their heirs, successors, representatives or descendants may apply and distribute the same, all circumstances duly considered in such manner and to such parties as to them may appear just. Upon this clause, it is contended on behalf of the plaintiff that it is a gift to the executors upon trust, and inasmuch the objects of the trust fail, as the testatrix has not declared what the trusts were, the property comprised in this clause results for the benefit of the next of kin of the testatrix. The defendants, on the other hand, maintain that it is a good gift of the residue to the executors for their own use, and that no trust is attached to the gift.

The question involved in this clause of the Will is one which has often occurred, and upon which there are numerous decisions not very easily reconciled. And, indeed, considering the nice distinctions upon which the decisions often turn, and the variety of expressions used by different testators, it is not surprising that it should not be easy to deduce the principles, which should guide one in the construction of any particular Will, which must, in all probability, differ in some respect from any of these, on which decisions have been pronounced.

In construing any Will, the object, of course, is to ascertain the intention of the Testator, as far as it can be ascertained from the language of the Will itself. And it is the duty of the Court, if the testator has expressed his intention in clear and apt words, and there is nothing in it, contrary to the rules of law, to carry out that intention. But, if the testator, although he may have dimly shadowed forth what his wishes are, does not express them with sufficient certainty to enable the Court to carry them out, it would follow, that so far, as he has failed to explain his wishes with certainty, he must be declared to have died intestate.

In the commencement of the Will at present under consideration, the testatrix expresses her confidence in certain persons and appoints them her executors; and then gives to them all her property and effects whatsoever, "but in trust always for that purpose 'hereinafter mentioned.'" The testatrix then goes on to declare certain trusts of a portion of her real and personal estates, some of them being for the benefit of three of the executors, and some for that of other persons. It is also to be remarked that, in the third clause of the Will, the testatrix directs that certain sums of money which were to accrue from the interest on moneys lent, and rents of houses, should, as they accrued, "become part of her 'trust estate,'" and that there is no subsequent declaration of trust

of this portion of her estate, unless the residuary clause is to be taken as such. HACKETT, J.
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The general intention of the testatrix is clearly expressed in the first clause of the Will. Her wish was to make a certain property in Beach Street, the family residence of the families of her late husband and his partner, in perpetuity, so that it might be inalienable, and also to secure the perpetual investment in certain hands, of a large sum of money, which was to be part of her trust estate. And it is clear that her executors were appointed for the purpose of carrying out these objects. ONG CHENG
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The Attorney-General for the plaintiff has contended, that the residuary estate does not vest in the executors for their own benefit, because it appears upon the whole Will that the gift was to them only in trust. He relied upon the words "having every confidence in" at the commencement of the Will, and also upon the fact that the property was only given to them as executors, but in answer to that observation, it may be said, that there are no such words in the 15th clause. The whole question here seems to me to resolve itself into this, whether the 15th clause is to be read as so intimately connected with the previous part of the Will, as that it must be read as continuing the trust, which the testatrix had previously created, or whether the gift was an independent one and to be construed by its own terms, without reference to the previous part of the Will. Several cases were referred to by the Attorney-General in support of his view. In *Fowler v. Garlike* [2 R. & My. 232.], and *Vesey v. Janson*, [1 S. & St. 69] the gifts were expressly on trust, and in *Stubb v. Sayers*, [2 Kee. 255.] there was an express declaration in favour of the testator's family. Again in the *Corporation of Gloucester v. Wood*, [3 Hare. 131.] there was express mention of a purpose of the testator, which could not be ascertained, and in *Briggs v. Penny*, [21 L. J. Ch. 265.] there were the words "well knowing that he will make a good use, and dispose of it according to my views and wishes." In *Salt Marsh v. Barrett*, [30 L. J. Ch. 853.] there was a gift of all the testator's property to his executors, charged with the payment of legacies, and a direction that all their costs and expenses should be borne by his estate, and it was held by the M. R. and L. J. Turner that the executors were trustees for the next of kin. L. J. Knight Bruce, however, was of a different opinion, and thought they took beneficially. In that case there were legacies to the executors and also a clause of indemnity, which circumstances were held to negative the intention to benefit them. L. J. Turner based his decision not on the words of the clause containing the gift, which he said, would be sufficient to give the residue beneficially, but on the construction of the Will taken as a whole. In *Barris v. Fowkes*, [33 L. J. Ch. 484] there was a gift to an executor of the residue of the testator's estate "to enable him to carry into effect the purposes of the Will," and Wood V. C. held, that it was a gift for something which the devisee was bound to do, and that it was therefore a trust.

Mr. Rodyk for the defendants contended that the executors take beneficially; that there is nothing in the 15th clause of the

HACKETT, J. 1872. Will to shew that a trust was intended, and that, in this respect, it differs from the 1st clause. He cited numerous cases in support of his contention. In *Lefoy v. Flood*, [4 L. J. Ch. Report, 1.] the Will was very special and intricate, and its provisions do not at all resemble those of the Will now in question. In *Meredith v. Heneage*, [1 Sim. 542.] there was a gift to the testator's wife "unfettered and unlimited" in full confidence that she would give it to such of his father's heirs as she might think most deserving. It was held that the wife was absolutely entitled for her own benefit. But in that case much reliance was placed on the words "unfettered and unlimited."

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But it appears to me that the case which most strongly supports Mr. Rodyk's view of the 15th clause is, that of *Gibbs v. Rumsey*, [2 Ves. & B. 394]. In that case the testatrix gave her executors legacies for their care and trouble, and subsequently made a residuary bequest to them describing them by their character of trustees and executors, and also by their names, the same "to be disposed of unto such person and persons, in such manner and form, and in such sum and sums of money, as they, in their discretion, shall think proper and expedient." With the exception of describing the executors by name, the residuary gift in *Gibbs v. Rumsey*, is very similar to that which we are considering, and if the matter rested on the 15th clause only, I should feel myself much pressed by the authority of *Gibbs v. Rumsey*.

But in construing this clause and endeavouring to ascertain what the testator intended, I am bound to take the Will as a whole. Now it is clear that the testatrix was anxious to constitute a large portion of her property into a perpetual trust for the benefit of two families. This clearly appears from the 1st, 2nd, 3rd and 4th clauses of the Will. In the 3rd clause, she directs that certain annual payments, of a considerable amount, shall, as they accrue, form portion of her trust estate. But in no subsequent portion of the Will is, any disposition, made of this trust estate by name. There are two modes of accounting for this, either by the supposition that the testatrix, when she had come to the residuary clause, forgot all about her trust estate, or else the residuary gift was to the executors in the character of trustees. It appears to me that the latter of the two suppositions is the most probable. The testatrix commences her Will, expressing her confidence in the persons whom she names her executors, and to whom she gives all her property, "but in trust always for the purposes thereafter to be mentioned." The principal object of her desire seems to have been to keep the bulk of her property together for the benefit of the persons with whom she was living, and to carry out this object she selected the four persons whom she named as her executors. Coupling this circumstance with the omission to declare the trusts of the annual proceeds of the rents of the houses and interest of money lent, I am led to think, that when the testatrix gave these persons the whole residue of her estate, it was given to them in order to carry out the wishes which she seemed to have so much at heart, and not merely for their own use. The opinion is strengthened by the circumstance that the gift is, to the "execu-

"tors" merely, and not to the persons by name, as was the case in *HACKETT, J. Gibbs v. Rumsey*. This circumstance in itself would, perhaps, not be conclusive, but, I think, it may be taken as some evidence to show that the gift was fiduciary and not beneficial. 1872.

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I also think in construing the 15th clause, it is material to consider the clause which immediately follows. By the 16th clause, the testatrix states it to be her wish "that her executors may not be interfered with in the management of her estate, and that any of them accepting this trust, shall be competent to manage it, and that in the management thereof, the wish of the majority shall prevail." Now, if this clause refers to and is connected with the 15th clause, as I think it is, it seems clear, that the executors take the residue as trustees. Besides, if the testatrix did not intend the gift to the executors to be fiduciary, how can we explain the direction in the 16th clause "that if any of my executors, from absence, death or any other cause, become incompetent to act, that the continuing executors appoint other executors or trustees in his or their places and stead." Can it be contended that the testatrix meant to give a share of the residue of her estate to persons whom she might never have known, as might be the case if the executors were to hold the residue to their own use, and new executors were appointed. I may also mention that the words of limitation superadded to the gift of the executors, namely, "their heirs, successors, representatives or descendants," seem to me to confirm the opinion that a trust was intended. The word "successor" used here, seems to show, that the gift of the residue was intended to secure to the persons who might, from time to time, fill the office of executors of the Will, and was not confined to the persons whom the testatrix had named as her executors, and that the gift to them was, therefore, fiduciary and not beneficial.

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Upon consideration of the whole Will, I am of opinion, that this is one of those cases in which a testator shows an intention to create a trust, but has not denoted its objects with sufficient certainty. I think, it is clear, that the testatrix here wished to perpetuate the devolution of her wealth in a certain way, and that she selected her four executors to carry out her wishes. These wishes, she has not expressed, and judging from the indications she has given of her desire in other parts of the Will, it is probable that if she had expressed them they could not be effectuated, but, as it is, there being no trust declared of the residue, the executors must be held to be trustees for the next of kin of the testatrix.

I have now to consider the different trusts, which the testatrix has declared, of the property devised to her executors.

The first clause is as follows :—

"As my long experience tells me that nothing tends so much to the prosperity, happiness and respectability of a family, as keeping its members as much as possible together, it is my wish that the four shops or houses left by my late husband, should continue to be the family house and residence of the family of Khoo Sek Chuan referred to above, and also of any part of the family of Lim Keng Wah, my late husband now residing in China, who may visit this Island, and that they shall neither be mortgaged or sold." The

HACKETT, J. Attorney-General has contended that this clause is void for uncertainty and that nothing passes by it, and I confess, that after an attentive consideration of it, I am unable to place upon the clause any construction which can be carried out consistently with the rules of law.

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The object of the testatrix seems to have been that the four shops or houses left by her husband should remain in perpetuity, the family house of the family of Khoo Seck Chuan [who is dead] and also of any part of the family of her late husband now residing in China who may visit Penang. Now, there are two objections to this clause, first, as infringing the rule against the perpetuities, and secondly, if we are to read the clause omitting the prohibition to sell or mortgage, it is open to the objection of uncertainty. If I am asked what is the meaning of the word "family" here, I must confess, I am unable to place a fixed construction on it, or to say what members of the respective families are included in it, whether the word refers to descendants or whether it also includes collaterals. If any authority were required to shew that the word "family," is in itself an uncertain term, it may be found in the cases referred to in *Jarman on Wills*, pp. 81, 82. But independently of the objection of the uncertainty of the meaning of the word "family," there is no term specified for the duration of this family house, either for any life or lives, or for any term of years, and it seems to me on this ground also, the trust is void for uncertainty. I, therefore, feel bound to declare the trust invalid, and the subject, therefore, falls into the residue of the testatrix's estate.

The second clause of the Will is as follows :—

"With this object in view [referring to the 1st clause] I direct my executors, so soon after my death as possible to lease to two of their number named Khoo Kay Chan and Lim Cheng Keat, their heirs and assigns, the lower story of the said four houses or shops that is to say, the whole of the shops, warehouses and all other places in the premises, now used for such purposes or that may be added thereto, for a period of forty years, from the day of my death, at a rent of one hundred dollars per month, for each and every month, during the said period of forty years. The upper story of the same four houses to be occupied by the several members and descendants of Khoo Seck Chuan and Lim Keng Wah as already proposed."

The Attorney-General contended, that this trust is illegal, and referred to *Attorney-General v. St. Catherine's Hall*, Jac. 381, where a condition annexed to a gift, that the rents of tenant should not be raised, was held void. But that was on the ground of repugnancy and the reason does not seem to me to apply in this case, as we have here no gift to which the lease is annexed as a condition, and the testatrix had a perfect right to make a lease for any number of years she thought fit, and at any rent she thought proper. I therefore think, this is a good trust. For the same reason, I think, the trust in the next clause [the third] is also good.

By the 3rd clause, the testatrix directs, that the sum of fifty thousand dollars may be given in loan to the renters of her four shops, Khoo Kay Chan and Lim Cheng Keat, their heirs and assigns,

for the same period of forty years, at the rate of interest of five per cent per annum, to be paid monthly, and she further directs, that this interest and the proceeds of the rents mentioned in the foregoing paragraph, as they accrue, shall become part of her trust estate. The testatrix would have been able to lend this money for any time she thought fit, and if so, of course, she could empower her trustees to make a similar loan. I, therefore think, that this is a good power given to the trustees and that it is not opposed to any rule of law. The Attorney-General seemed to think that the latter part of the clause, contained a direction to accumulate, but I cannot agree with him. There is merely a direction, that the interest, and rents, as they accrue, shall form part of the testatrix's trust estate, and as there is no declaration of trust, the interests and rents, &c., to pass to the executors under the general residuary gift.

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The 4th clause directs, that at the expiration of the forty years referred to in the 2nd and 3rd clauses, the executors, or their successors or representatives, shall make an arrangement as regards leasing the shops and warehouses, and lending out the fifty thousand dollars similar to those already referred to, and that the same process might be repeated from time to time, and for such periods as the English law might admit of, and at such rates of rent and interest as her executors, their successors or representatives for the time being, might think proper. This clause has been attacked by the plaintiff as bad in law, and void, but it appears to me, that is a trust which can be carried into effect. Nothing is more common in one part of the United Kingdom [Ireland] than the tenure by lease for a term perpetually renewable. This, I apprehend, may either be for a term of years or for life. If this be so, and if the testatrix herself could have granted this lease with a covenant for renewal, after the expiration of each term of forty years, and so on for ever, it seems to me that she had power to direct her trustees to do the same thing. I, therefore, think this trust is a good one, and the same remark applies to the renewal of the loan of the fifty thousand dollars.

The next clause to be considered is the 7th. By that clause the testatrix directs, that in the event of Lim Ah Yong not wishing to live in the family house, in that case, he and his family be allowed to occupy the house in Beach Street, No. 424, free of rent for a period of forty years, from the day of her [testatrix's] death, after which, the property is to become his property, or that of his heirs or assigns.

Mr. Rodyk who appeared for Lim Ah Yong, appeared to think that the gift of the fee to Lim Ah Yong was void, and he did not argue the point; but as the construction of this clause does not seem to him to be free from doubt, I propose to give Lim Ah Yong's Counsel an opportunity of arguing the question before I give my decision. [a] And as the same question arises in the gift to Wee Sah Neo in the 8th clause, I also reserve my decision on that clause.

The next clause of the Will attacked is the 11th. By that clause the testatrix directs, that her two plantations at Batu Lanchang on which the graves of the family are placed, shall be re-

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HACKETT, J. served as the family burying place, and shall not be mortgaged or sold. It is contended by the Attorney-General, that this gift is void as being a perpetuity and not a charity.

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The law in this question seems to have been rather unsettled. Lord Ellenborough expressed an opinion [See *Doe v. Pitcher*, Taunt, 359] that although a trust to repair and, if need be, re-build a vault and tomb for the testator and his family, was not a charitable use, with respect to the party's own interment, it was so with respect to that of his family. But the correctness of that opinion has been questioned, [See *Wms. Exors.* p. 1000.] and the tendency of recent decisions has been to the effect, that a gift merely for the purpose of keeping up a tomb or a building, which is of no public benefit and only an individual advantage, is not a charitable use but a perpetuity, and therefore void. [See *Thompson v. Shakespear*, 1 Johns. 612., *Carr v. Ling*, 2 de G. F. and J. 75., *Richard v. Robinson*, 31, B. 144., *Hoare v. Osborne*, 1. L. R. Eq. 585.] In accordance with the law as thus stated, I feel bound to hold that the gift of the two plantations is void as in perpetuity.

The next clause to be considered, is the 14th. By that clause, after providing for her funeral expenses, the testatrix goes on: "and I further direct, that a house termed, Sow Chong, for performing religious ceremonies to my late husband and myself, be erected on some part of the ground of the four shops, or houses already so often referred to, and of such size and description as to my executors may seem fit and proper." It is contended by the Attorney-General, that this gift also is void, on the ground that it is perpetual. According to the evidence of Koh Teng Choon, the "Sow Chong" is a sort of house in which the ashes of the deceased are placed, in fact, a species of tomb; and that the "Sin Chew" is a tablet placed in this house. This witness speaks with some authority, as he has a Sin Chew in his own house which, he says, is worshipped.

This question concerning the Sow Chong and Sin Chew was fully investigated in a recent case, [*Choo Choon Neoh v. Spottiswoode*, reported in Woods' Oriental Cases, at Singapore, before Sir Benson Maxwell, [a] [and I am disposed to concur in the conclusions arrived at by that learned Judge, that it is not a charity. This gift must, therefore, be declared void as tending to a perpetuity.

19th September, 1872. The points reserved, as regarded clauses 7 and 8 of the Will, now came on for argument, and judgment.

Bond, for plaintiff.

D. Logan, for defendants.

Hackett, J.—The question in this case which has yet to be decided arises on the 7th clause of the Will which is as follows [reads it]. I have great doubt in construing this clause on account of the ignorance of the person who drew the Will, in the law, and therefore, not able exactly to express what the testatrix wanted. The question, I think, must be decided by general principles. The first thing is to find what was her intention. She evidently

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wanted the house to be a family house, and as Lim Ah Yong was one of the family, she allowed him to stop there for forty years. The question here is, is it a gift or a license which the trustee is ordered to give to Lim Ah Yong. The words "use and occupy" has been held by Lord Eldon to give or transfer the whole property, but here on looking at the whole clause, I don't think, the testatrix meant to give more than a mere license to rent the house to Lim Ah Yong, until forty years were over, and that the house was not to be sold or transferred to him till then.

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Forty years seems to be a favourite of the testatrix; throughout the whole Will she uses the mystical term or number of forty years. The trustees were to keep the property in their hands, but to allow Lim Ah Yong as a matter of favour to live there. Then come the words that the property was given to him in fee without power of alienation. Mr. Bond contends, that this gift in fee is void, on the ground of remoteness as being given after forty years, as the time limited by law was for lives in being and twenty-one years thereafter, or if the time is fixed, must not be more than twenty-one years. Mr. Logan contends, that this gift is a remainder and can take effect. If testatrix had said, she gave the house to Lim Ah Yong for forty years, and after that in fee, it would have been good, as it vested in him at once. According to law, if an estate is given in *futuro*, it cannot be construed as a remainder; even if one day was wanted, it would not be a remainder, but an executory devise. In *Fearne's Contingent Remainders*, in the introduction, curiously enough even, that learned and clever author made a blunder, as long as there is any suspense, it is not vested. Mr. Butler, in his notes to *Fearne*, remarks this blunder. The question is, had the devisee the estate, if he had, it was good as he had power to alienate. But here it was a license, and not a vested estate in Lim Ah Yong, to get the estate, he must wait till forty years after testatrix's death; the lands, therefore, would be tied up for forty years and the gift is, therefore, void as violating the law against perpetuities. There is no case on all fours with this, but *Fearne* at page 401 seems to think, such a gift would be void. This applies to the 8th clause also, and the property comprised in those two clauses therefore fall into the undisposed of residue, and the costs of all parties will come out of the estate.

The respondent appealed to Her Majesty in Council.

On 28th July, 1875, the appeal came on to be heard before:—

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

This is an appeal from a decree of the Supreme Court of the Straits Settlements [Division of Penang], in a suit in equity, brought by the first respondent, Ong Cheng Neo, against the appellants, the executors of the Will of Oh Yeo Neo. Some of the legatees under the Will were also made defendants in the suit. The first respondent claimed to be entitled as the half-sister and

HACKETT. J. 1872. one of the next of kin of the testatrix. She did not dispute the validity of the Will, but contended that the bequest of the residue and some of the specific bequests were void.

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The testatrix and the parties to the suit were Chinese, dwelling in Penang, and the real property devised by the Will is situated in that island.

The first question raised in the appeal, related to the right of Ong Cheng Neo to maintain the suit. It was not disputed that she and the testatrix were daughters of the same mother, Cheah Tuan Neo; but it was contended that Ong Cheng Neo was not legitimate. It appears that the testatrix was the only child of Cheah Tuan Neo, by her husband, Oh Wee Kee, who died in 1806. It is said that in 1809 the widow, Cheah Tuan Neo, married Ong Sye, and that the respondent, Ong Cheng Neo, and a deceased sister, were the offspring of that marriage. The appellants do not deny that the widow and Ong Sye cohabited from 1809 until Ong Sye's death in 1811 or 1812, but they disputed the alleged marriage. A great deal of evidence was gone into upon the question, to which their Lordships do not think it necessary to advert in detail, since they are perfectly satisfied with the conclusion at which the learned Judge below has arrived, *viz.*, that the marriage was established.

It was not disputed that Ong Sye and Cheah Tuan Neo lived together as man and wife, and were so treated by their family and friends, nor that the plaintiff and her deceased sister were regarded and treated as legitimate children. So much was this the case, that the testatrix herself had allowed her sister, Ong Cheng Neo, to take out administration to the mother's effects. In addition to strong and consistent evidence of reputation, witnesses were called who were present at the marriage festivities; and although some of the usual ceremonies, such as the giving away of the woman, were not distinctly proved to have taken place, there is ample evidence from which, at this distance of time, the performance of them may be presumed.

The principal opposing evidence came from some members of the family, who say they were not present at any marriage ceremony, and did not know that any had occurred, and of a witness who deposed that the testatrix had spoken of the connection of her mother with Ong Sye as a shameful one. But the Judge below has expressly found that this last witness was not worthy of credit, and the evidence of the other witnesses relates to facts of a negative or inclusive character, which the Judge rightly thought, was insufficient to countervail the positive evidence of the witnesses who were present at the marriage festivities, and the presumption arising from reputation.

It is said that, with the Chinese, the difference between the social status of a wife and that of a concubine, and in the position and treatment of legitimate and illegitimate children, is so slight, that what is termed reputation, affords no satisfactory ground for presuming a marriage. But if this be so, which, however, is not very clearly established, their Lordships see no reason, in the absence of satisfactory evidence to the contrary, why the ostensible relations

of the parties should not be referred to a legitimate and correct connection, rather than to an illegitimate and, to say the least, a less correct one.

The Will in question is drawn in the style of an English Will, and attested according to English law; and the main question in the suit, *viz.*, the effect of the bequest of the residuary estate to the executors, was discussed and argued at the Bar upon the principles which govern such a bequest in an English will.

The Will commences as follows:—

"Know all men by these presents that I, Oh Yeo Neo, Chinese single woman, being of sound mind, do hereby make and publish this my last Will and Testament.

"I am now possessed of considerable property in money, houses, lands, and so forth, and of four shops or houses in Beach Street, numbered respectively 40, 41, 42 and 43, comprised in two bills of sale, registered respectively No. 313 and 1930, and of two Government grants for land reclaimed from the sea, and forming part and parcel of the four shops or houses just mentioned, these four shops or houses having been left by my late husband, Lim Kong Wah, who died about twenty-six years ago.

"Having no children of my own, and having every confidence in Yeap Cheah Neo, the wife of one of the partners of my late husband, named Khoo Seck Chuan, with whom I have long lived, in Koo Kay Chan, her son, in Khoo Siew Jeong Neo, her daughter, and in Lim Cheng Keat, a nephew of Lim Kong Wah, her son-in-law, I do hereby appoint them the executors of this my last Will and Testament, and I do hereby make over to them as such, all property and effects whatsoever that may belong to me at the time of my death, but in trust always for the purpose hereinafter to be mentioned.

"1st. As my long experience tells me that nothing tends so much to the prosperity, happiness, and respectability of a family as keeping its members as much as possible together, it is my wish that the four shops or houses left by my late husband should continue to be the family house and residence of the family of Khoo Seck Chuan referred to above, and also of any part of the family of Lim Kong Wah, my late husband, now residing in China, who may visit this island, and that they shall neither be mortgaged nor sold.

"2nd. With this object in view, I direct my executors, as soon after my death as possible, to lease to two of their number, named Khoo Kay Chan and Lim Cheng Keat, their heirs and assigns, the lower story of the said four houses or shops, that is to say, the whole of the shops, warehouses and all other places in the premises now used for such purposes, or that they may be added thereto, for a period of forty years from the day of my death, at the rent of 100 dollars per month for each and every month during the said period of forty years. The upper story of these same four houses or shops to be occupied by the several members and descendants of Khoo Seck Chuan and Lim Kong Wah, as already proposed."

The testatrix then in other clauses, [numbered 3 to 14] by way of directions to her executors, makes specific dispositions of portions of her property, principally for the benefit of members of the families of Khoo Seck Chuan, and of Lim Kong Wah, her late husband.

Some of these clauses raise questions apart from the gift of the residue, which have to be decided in this Appeal.

The concluding clauses of the will are as follows:—

"15th. As regards the remainder of my real and personal property, of what kind soever, not already disposed of, I direct that my executors shall receive and collect the same from all persons whatever, and in such manner as to them may seem proper, and I direct that they, their heirs, successors,

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It will be seen from the Will that the testatrix wished to benefit the relatives of her late husband, some of whom lived in China, and also the family of her husband's partner Khoo Seck Chuan, some of the latter being her executors and trustees.

It was contended on the part of the appellants that the residuary clause contained an express bequest to the executors in terms, which imported an absolute gift to them; and a recent decision of the House of Lords [*Williams v. Arkle*] was cited to establish that in the case of such a devise the Statute of the 11th Geo. IV. and 1st Wm. IV. c. 40, had no application. Their Lordships entirely concur in that view of the Statute; but the question of the nature and character of the bequest remains, and it has to be decided, whether, according to the proper and natural construction of the language and provisions of the Will in question, regarded as a whole, the intention was to create a trust in the residue, or to make a beneficial gift of it to the executors. This question, in all cases of the kind, must be determined, as Lord Cottenham said in *Ellis v. Selby* [1 Myl. and Cr., 298], upon the construction of the language of the instrument in each particular case.

In entire accordance with Lord Cottenham's view the present Lord Chancellor, in delivering his opinion to the House of Lords in *Williams v. Arkle*, said: "Where an express devise of the residue is found, the meaning of that residuary bequest must be ascertained by the ordinary rules of constructions."

In the numerous decisions which are found in the books on this subject, various matters have been relied on as *indicia* of intention on the one side or the other, such as the use of the words "upon trust;" the gift of specific legacies to the executors or trustees; and the mention of the executors by their proper names. *Indicia* of this kind, on which eminent Judges have relied, may, no doubt, afford in some cases useful aids to constructions, but after all, they may, and often must, be modified by the provisions and language of the particular instrument to be construed.

Mr. Hemming, for the appellants, cited what he described to be two representative cases on the subject: *Morice v. Bishop of Durham*; 10 Ves. 335, and *Gibbs v. Rumsey*, 2 Ves. and Beames 394.

He did not deny the principle laid down by Lord Eldon in *Morice v. Bishop of Durham*, that "if the testator meant to create a trust, and not to make an absolute gift; but the trust is in-

"effectually created, or is not expressed at all, or fails, the next of kin take." Indeed, he cited that case as a leading authority, but he contended that the present one fell within the decision of Sir W. Grant in *Gibbs v. Rumsey*, who there held that the words of a residuary clause giving the residue to the trustees and executors "to be disposed of unto such person and persons and in such manner and form, and in such sum and sums of money as they, in their discretion shall think proper and expedient," did not in the particular will before him import a trust, but an absolute gift to the trustees.

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This case of *Gibbs v. Rumsey* is the authority on which the Appellant's Counsel most strongly relied, but it is to be observed with regard to it that even if the present Will were not distinguishable, [a question to be presently considered] Lord Cottenham certainly expressed no approval of the case in *Ellis v. Selby*, and Wood, V. C., in *Buckle v. Bristow*, [10 Jurist, 1,095] spoke of it as going to the verge of the law.

Coming to the Will in question, it will be seen that, in the commencement, the testatrix, after appointing four executors, makes over to them "as such" all her property and effects, "but in trust always for the purposes hereafter mentioned," words which, taken alone, indisputably impress a trust upon the whole property.

The 1st and 2nd clauses show the desire of the testatrix to keep the family together, and for this purpose she directs the executors to preserve certain houses as a family house, for the residence of the family of Khoo Seck Chuan, and of any members of her late husband's family living in China who might visit Penang; and she directs what appears to be a beneficial lease of some shops in the lower part of the houses to be granted to two of the executors for forty years.

By a further clause the testatrix directs 50,000 dollars to be given on loan to the same executors for forty years, at 5 per cent. interest, but directs that the rents of the shops and their interest shall become part of her trust estate.

There are numerous other specific bequests, but it appears that they are far from exhausting the estate, and that a large residue will be left.

The clause disposing of this residue has been before set out at length. In trying to reach its meaning, it is to be observed that it contains no words of gift, but directions to the executors, and that they are mentioned by that title, and not by name. The first direction is to collect and receive the residue; the next, "that they, their heirs, successors, representatives, or descendants, may apply and distribute the same [all circumstances duly considered] in such manner and to such parties as to them may appear just." These are neither usual nor apt words of absolute gift; on the contrary, they indicate an intention to impose a trust to distribute the fund among persons other than, or at all events, in addition to themselves.

It may be inferred from the rest of the Will that the persons intended to be benefitted were the members of the families she

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That this was her real purpose, and that it was her intention to create a trust to carry it into effect, seems to be apparent both from the general frame of the Will, and its particular provisions.

Looking only to the bequests to the executors, what appears? The first bequest vests all the property in the executors "as such" and "in trust always" for the purposes thereafter mentioned. Then turning to the residuary clause, the use of words of injunction instead of those of gift or bequest, the directions given to the executors, not by name, but by the description of "my executors," the nature of these injunctions, viz., to collect the residue and distribute it, after duly considering all circumstances, to such parties as to them, their heirs, successors, &c., may seem just, and the mention of successors in relation to this duty, all negative the supposition that the testatrix intended to sever the residue from the trust with which she had clothed all her property in the hands of her executors, and to make an absolute gift of it to them as individuals.

It was said that the learned Judge of the Supreme Court laid too great stress on the inference arising from the clause relating to the management of the estate, and the appointment of new executors and trustees. Undoubtedly, in any view of this case, there were trusts to be performed, which would make such a clause pertinent; and if there had been plain words of gift to the executors, as in *Williams v. Arkle*, little weight could be attached to this clause. It is enough for their Lordship to say of it, agreeing so far with the learned Judge below, that in their opinion, its provisions and language are more consistent with the construction they have put on this Will, than with the opposite view of it.

It will be seen from the above analysis of the Will in question, that it differs in material respects from that in *Gibbs v. Rumsey*. There, property, was devised to the executors upon trust to sell and to pay certain legacies, and this was followed by a clear gift of the residue, introduced by the apt words, "I give and bequeath," to the trustees and executors, whose names were given in a parenthesis, with absolute power of disposition, and without any indication of the families or persons whom the testatrix desired to benefit. This Will, both in its frame and provisions, materially differs from that, now in question.

Several cases were cited in the argument, in which various forms of expression, conferring unlimited and unconditional powers of disposition, were held to amount to absolute gifts. It is unnecessary, however, to discuss these decisions, or to consider what would be the proper construction of the discretionary power in this Will if it had been coupled with plain words of gift, uncontrolled by other parts of the Will. Their Lordships' decision,

founded on the whole Will, is, that a trust was intended to be created, which has failed for want of adequate expression of it.

The decree below has declared several of the specific bequests to be void ; and as regards three of them, the decree is complained of in this appeal.

These are [1] the devise of the upper story of the four shops in trust for a family residence of the families of Lim Kong Wah and Khoo Seck Chuan, which is declared to be void "for uncertainty and as infringing the rules against perpetuities ;" [2] the devise in the 11th clause of two plantations, in trust to be reserved as a family burying place, with a prohibition against mortgaging or selling the same, which is declared void, as infringing the rule against perpetuities ;" and [3] the devise in the 14th clause, directing that a house, termed "Sow Chong," for performing religious ceremonies to the testatrix's deceased husband and herself, should be erected, as to which the decree declares, "that the said trust not referring to a charitable object, is void, as infringing the rule against perpetuities."

In considering what is the law applicable to bequests of the above nature in the Straits Settlements, it is necessary to refer shortly to their history.

The first charter relating to Penang was granted by George III, in 1807, to the East India Company. It cited that the Company had "obtained by cession from a native prince," Prince of "Wales' Island, and a tract of country in the peninsula of Malacca, "opposite to that Island," that when such cession was made, the Island was wholly uninhabited, but that the Company had since built a fort and a town, and that "many of our subjects and many "Chinese, Malays, Indians, and other persons professing different "religions, and using and having different manners, habits, customs, and persuasions, had settled there." The charter made provision for the government of the Island, and the Administration of Justice there. It established a Court of Judicature, which was to exercise all the jurisdiction of the English Courts of Law and Chancery, "as far as circumstances will admit." The Court was also to exercise jurisdiction as an Ecclesiastical Court, "so far as the several "religions, manners, and customs of the inhabitants will admit."

A new Charter was granted by George IV. in 1826, when the Island of Singapore and the town and fort of Malacca were annexed to Prince of Wales' Island, which conferred in substance the same jurisdiction on the Court of Judicature as the former Charter had done.

The last Charter granted to the East India Company, in the year 1855, again conferred the like powers on the Court ; and this jurisdiction was not altered in its fundamental conditions by the Act of the 29th and 30th Vict., c. 95, and the Order of the Queen in Council made in pursuance of it, by which the Straits Settlements were placed under the government of Her Majesty as part of the Colonial possessions of the Crown, nor by Ordinance No. 5 of 1868, constituting the present Supreme Court.

With reference to this history, it is really immaterial to consider whether Prince of Wales' Island, or, or as it is called, Penang,

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should be regarded as ceded or newly settled territory, for there is no trace of any laws having been established there before it was acquired by the East India Company. In either view the law of England must be taken to be the governing law, so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances. This would be the case in a country newly settled by subjects of the British Crown; and, in their Lordships' view, the Charters referred to, if they are to be regarded as having introduced the law of England into the Colony, contain the words "as far as circumstances will admit," the same qualification. In applying this general principle, it has been held that statutes relating to matters and exigencies peculiar to the local condition of England, and which are not adapted to the circumstances of a particular Colony, do not become a part of its law, although the general law of England may be introduced into it. Thus it was held by Sir W. Grant that the Statute of Mortmain was not of force in the Island of Grenada [*Attorney-General v. Stewart*, 2 Mer. 142.] The subject is discussed at large in *Mayor of Lyons v. East India Company*, 1 Moore, P. C. 175.

The learned Judge below has not, however, held the gifts in question to be void on the ground that they infringed any statute, but because they were opposed to the rule of the English law against creating perpetuities.

Their Lordships think it was rightly held by Sir P. Benson Maxwell, Chief Justice, in the case of *Choa Choon Neo v. Spottiswoode*, reported in Wood's Oriental Cases, [a] that whilst the English statutes relating to superstitious uses and to Mortmain ought not to be imported into the law of the Colony, the rule against perpetuities was to be considered a part of it. This rule, which certainly has been recognized as existing in the law of England independently of any statute, is founded upon considerations of public policy, which seem to be as applicable to the condition of such a place as Penang to England; viz., to prevent the mischief of making property inalienable, unless for objects which are in some way useful or beneficial to the community. It would obviously be injurious to the interests of the Island, if land convenient for the purposes of trade or for the enlargement of a town, or port could be dedicated to a purpose which would for ever prevent such a beneficial use of it. The law of England has, however, made an exception, also on grounds of public policy, in favour of gifts for purposes useful and beneficial to the public, and which, in a wide sense of the term, are called charitable uses; and this exception may properly be assumed to have passed with the rule into the law of the Colony. [See *Thompson v. Shakespear*, 1 De Gez, F. & L, 399; *Carne v. Long*, 2 De Gez. F. and L., 75.]

The question then is, whether the Judge below is right in holding that the bequests in question infringed the rule, and did not fall within the exception.

The first of them, which relates to the upper story of the houses, the testatrix desired to make a family house, appears to their

[a] ante p. 216.

Lordships to be void on both the grounds mentioned in the decree. The context shows that, in using the word "family," the testatrix meant at least two families, and that she intended to include not only descendants, but other members. From other parts of the Will and from the evidence, it would seem that children had been adopted by members of the family, and, having regard to Chinese family usages, which may be properly taken into consideration in construing the Will, it is probable the testatrix meant to include some at least, of these adopted children, but what natural and adopted members of the family she really intended to benefit is left wholly obscure and uncertain. The devise is, therefore, for that reason void. Then the expression of her desire to perpetuate the family and to keep the house for their residence, and the direction that the houses should neither be mortgaged nor sold, clearly denote an intention to create a perpetuity. Their Lordships, therefore, see no ground to disturb the decree with regard to this devise.

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The devise of the two plantations in which the graves of the family are placed, to be reserved as the family burying-place, and not to be mortgaged or sold, is plainly a devise in perpetuity. The only question is whether it can be regarded as a gift for a charitable use. The weight of authority is against a devise of this nature being so held in the case of an English Will; and the only point, therefore, requiring consideration can be, whether there is anything in Chinese usages with regard to the burial of their dead, and in the arrangements for that purpose in Penang, which would render such an appropriation of land beneficial or useful to the public. It is to be observed that the extent of the plantations nowhere appears, and it may be, they contain more land than would be required for the purpose of a family burial ground. In the absence of any information respecting usages of the kind adverted to, and of the extent of these plantations, their Lordships feel unable to say that the decree on this point is wrong.

The remaining devise to be considered, is the dedication by the testatrix of the Sow Chong house for the performance of religious ceremonies to her late husband and to herself. It appears to be the usage in China to erect a monumental tablet to the dead in a house of this kind, and for the family at certain periods in every year, to place, with certain ceremonies, food before the tablet, the savour of which is supposed to gratify the spirits of their deceased relatives. This usage, with the accompanying ceremonies, is minutely described by Sir P. Benson Maxwell, in his judgment in the case of *Choa Choon Neo v. Spottiswoode*.

Although it certainly appears that the performance of these ceremonies is considered by the Chinese to be a pious duty, it is one which does not seem to fall within any definition of a charitable duty or use. The observance of it can lead to no public advantage, and can benefit or solace only the family itself. The dedication of this Sow Chong house bears a close analogy to gifts to priests for masses for the dead. Such a gift by a Roman Catholic widow of property for masses for the repose of her deceased husband's soul and her own was held, in *West v. Shuttleworth*, 2 Myl. and Keene, 684, not to be a charitable use, and although not com-

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ing within the Statute relating to superstitious uses to be void. The learned Judge was, therefore, right in holding that the devise, being in perpetuity, was not protected by its being for a charitable use. It is to be observed that in this respect a pious Chinese is in precisely the same condition as a Roman Catholic who has devised property for masses for the dead, or as the Christian of any church who may have devised property to maintain the tombs of deceased relatives. [See *Richard v. Robson*, 31 L. J. Ch. 896, and *Hoare v. Osborne*, L. R. 1 Eq. 585.] All are alike forbidden on grounds of public policy to dedicate lands in perpetuity to such objects.

Their Lordships' decision on the bequest they have last considered accords with the judgment of Sir P. Benson Maxwell in the case already referred to. It appears to them that, in that judgment, the rules of English law, and the degree in which, in cases of this kind, regard should be had to the habits and usages of the various people residing in the Colony, are correctly stated.

It remains to be observed that this appeal has been heard upon special leave granted by their Lordships after leave to appeal had been refused by the Supreme Court of the Colony. This refusal proceeded upon the opinion of the Court that the power of appeal to Her Majesty and the authority of the Court to grant leave to do so, contained in the Letters-Patent of the Queen of the 10th August, 1855, were abrogated by Ordinance No. 5 of 1868, establishing the present Supreme Court.

It was admitted by the learned Counsel for the respondents that they could not uphold this decision; and upon referring to the Ordinance, their Lordships think, the Supreme Court misconceived its effect. It is true that the Ordinance enacts, in the 1st section, that the Court of Judicature established under the Letters-Patent above referred to, is thereby abolished; and that the Letters-Patent shall cease to have any operation in the Colony. But the 4th section enacts, that all provisions of Acts of the Imperial Parliament, Orders of Her Majesty in Council, Letters-Patent, &c., in force in the Colony, when the Ordinance came into operation, and which are applicable to the Court of Judicature [*i.e.*, the Court abolished by the Ordinance], or to the Judges thereof, shall be taken to be applicable to the Supreme Court [*i.e.*, the Court established by the Ordinance], and to the Judges thereof. The effect of these enactments, taken together, is that whilst the repealed Letters-Patent ceased to have any operation of their own, all the provisions contained in them applicable to the old Court were virtually re-enacted, and made applicable to the new Court which was put in its place, as effectually as if they had been repeated at length in the Ordinance.

The other parts of section 4 and section 30 are entirely consistent with this interpretation.

In the result, their Lordships will humbly advise Her Majesty to dismiss the appeal, and affirm the decree of the Supreme Court. But, considering that the questions involved in the suit are novel, and in some respects of the first impression, that the

litigation has arisen mainly in consequence of the obscure and uncertain manner in which the testatrix has expressed her wishes, and that the executors were thereby placed in difficulty with respect to many of the bequests of her Will, they will make no order as to costs.

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HUSSAIN SAIBOO v. GOLAM MYDIN ET UXOR.

A mere deposit of title deeds without any writing referring to them, does not create any equitable mortgage, but only a pledge. [a]

Even if a mere deposit of title deeds as aforesaid, does create an equitable mortgage, still the person holding them, is entitled to maintain an action to recover the moneys, [for which the title deeds were deposited as a security,]—on the common money counts, although at the time he retains the title deeds as security.

PENANG.
HACKETT, J.
1872.
December 2.

This was an action on the common money counts.

The defendants pleaded the general issue. At the trial by the plaintiff's own shewing, it appeared that the money was paid by him to one Admacaka, to redeem a certain mortgage made by the defendants to him, who thereupon left the title deeds with him and promised verbally, to execute a valid mortgage of the same. This, they never did, but he, the whole, while retained the deeds. Sometime after, the money not having been repaid, the present action was commenced. The counsel for the defence, thereupon, without cross-examining him or proceeding any further with the case, admitted the truth of the plaintiff's story, but objected that this action could not be maintained.

Bond, for the defendants. I submit, the plaintiff must be non-suited. *First*, the advance was to Admacaka, and not to the defendants, and *secondly*, the deposit of the title deeds created an equitable mortgage. The deposit of the deeds was a security for the money which precluded plaintiff from suing.

[*Hackett, J.* A person who is a mortgagee on a bond, although he retains the mortgage, can maintain an action on the bond for the money.]

I submit he cannot. He is in possession of the property, and no action can be maintained by him. The plaintiff here, before bringing this action, never offered to give up the land, if he had done so, there might have been some ground for his maintaining it.

[*Hackett, J.* Have you any authority for your contention?]

I have none at hand at present; as I was not aware that the objection would have been taken. The plaintiff has never even demanded payment, shewing clearly he relied on the security.

[*Hackett, J.* There is evidence that he did demand payment?]

Yes, but when he made the demand, he did not offer to give up the deeds.

Ross, for plaintiff. We are quite willing to give up the grants provided the debt is paid. As the parties could not come to an amicable settlement, the present action was brought.

[a] But see *Russell v. Russell*, 1 Wh. & T's L. C. in Eq., 440, & notes thereto.

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[*Hackett, J.* I think we had better go on with the case.]

Bond. As to the second objection. The money was paid to Ad-macaka and not to the defendant—how can they be sued then?

[*Hackett, J.* The money was paid on their account. As you admit the debt, the case had better stop, and the only question is, as to costs; of course, if the action is properly brought, the plaintiff must have his costs. However, I shall give you time to look up authorities and consider the point of law.]

December 4. *Bond*, for the defendants. The plaintiff here has entirely mistaken his remedy, which is one in equity and not at law. This is no doubt an equitable mortgage, and his proper remedy is to go to a Court of Equity to ask for a foreclosure or specific performance in assigning the original mortgage to him. If he was a legal mortgagee, the case would be clear; but here he is simply an equitable mortgagee, and must come to a Court of Equity. I have found no case in which an equitable mortgagee has sued in law.

[*Hackett, J.* No; but the point is, have you found anywhere, that it has been held that the plaintiff is debarred from suing. It is clear on principle. An equitable mortgagee can maintain an action at law for the debt as much as a legal mortgagee can, and it is not necessary for him to go to equity. The only difference is, that the legal mortgagee must sue on the bond in an action of covenant or specialty, whereas the equitable mortgagee sues on the common money counts for money lent and the like.]

I submit an equitable mortgagee cannot sue at law at all for the debt, as long as he holds the mortgage.

[*Hackett, J.* I am of opinion he can. The only difference between a legal and an equitable mortgagee is this, the former has all he contracted for, but the other only an imperfect right. He can, however, in equity compel the mortgagor to give him a full title.]

The only authority I can find is, *Miller on Eq. Mtges.*, 68, and then that even is as to costs, citing a case in bankruptcy.

[*Hackett, J.* It does not say that he cannot bring an action; at all events, it is not in your favour.]

I have not yet seen the case the author refers to; but probably it might have been an action for the balance after the security was realised; of course that he is entitled to sue for. In *Titi v. Pow*, 1 Hare, 405; the Vice-Chancellor in giving judgment, points out the difference [p. 410] between a legal and an equitable mortgage, and remarks that an "equitable lien gives no right but by "sale." Vice-Chancellor Kindersley in *Matthews v. Goody*, 31 L. J. Eq. 282, is to the same effect. He there says the mode of enforcing an equitable mortgage "is by coming to a Court of Equity "to raise money by sale or mortgage."

[*Hackett, J.* He expressly states there, that in his opinion, a mere deposit of title deeds does not create an equitable mortgage.]

Here there is a parol agreement.

[*Hackett, J.* Yes, there is no written agreement here, and the mere parol one is void by the Statute of Frauds, as it is a charge on land. The deposit only created a pledge of the title deeds.]

The plaintiff's only remedy is to get a decree for sale or foreclosure, and the mortgagor is entitled to six months' time to pay up the money. *Parker v. Housefield*, 2 M. & K., p. 419—this case has since been confirmed by *Meller v. Woods*, 5 L. J. ch. N. S. 109. The case of *In re Fletcher*, 2 *Montague's Bank Cases*, 454, before referred to, seems against me: the equitable mortgagee there did bring an action at law but discontinued.

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[*Hackett, J.* The case is dead against you]

I submit it is in my favour, as the case was discontinued. Vice-Chancellor Kindersley in the case mentioned, expressly states what are the remedies of an equitable mortgagee.

[*Hackett, J.* Yes, in equity.]

And at law as well.

[*Hackett, J.* No. He was a very careful man—in fact all equity judges are careful—and never attempted to know anything of law, or to speculate on a person's rights at law.]

The case in *Montague's Reports*, clearly supports my contention. The action was discontinued, and the plaintiff went to his proper remedy. There is no report of the case as to why it was discontinued, but probably the Courts of Law refused to entertain the action. The case only proves that an action was brought, but dropped for some reason, unknown.

[*Hackett, J.* Suppose a person takes a pledge, he can sue at law. It is so clear that there is no need of any authority on the point, as there is nothing to bar him. If there was an agreement for time, it would be quite another thing, but here there is simply a pledge and no more. I take it that a lender of money can sell the security, and pay himself or bring an action. If the borrower tenders the money, and the lender refuses to give up the security, he has a right to bring an action of trespass.]

If such is the case, it is harder on the borrower in equity than at law, as equity keeps the tender waiting for six months, whereas he has at law, an immediate right of action.

[*Hackett, J.* That is quite a different thing, the six months are given before the property is sold, not before payment of money.]

Yes, the borrower has all that time to pay the money. I submit if an action for such a thing was commenced at law, equity would restrain it.

[*Hackett, J.* A debtor can always protect himself by payment at any moment. It is the duty of every debtor, immediately after money is due, to pay it; after that he is liable to the lender at any moment.]

The plaintiff here is in possession of the property, and yet is allowed to bring an action for the debt.

Hackett, J. You have only to pay the debt and, he must leave, if he does not, you can sue him in trespass or ejectment. I shall not call on Mr. Ross, as I am quite certain of the point.

Ross, for plaintiff was not called on.

Judgment for plaintiff with costs.

MAYANDEE CHETTY v. SULTAN MERACAYAR.

PENANG.

HACKETT, J.
1872.

December 6.

The defendant agreed with the plaintiff, that in consideration of Rs. 1,000 lent by plaintiff to defendant, that he would repay the same "within eleven days from the safe arrival of his vessel *Castle Eden*," at Singapore. The vessel, through his own default, never went to Singapore.

Held, in an action for breach of his agreement, that there was an implied undertaking on his part that his vessel, the said *Castle Eden* would go to Singapore, and inasmuch as she, through his default, did not, he was liable for his breach of such implied undertaking.

A person who voluntarily signs a document as surety, cannot set up as a defence, that no money at all passed to him, but simply to his principal, which was well known to the plaintiff.

Semble. This rule applies even to a joint and several promissory note made by a principal and surety.

This was an action to recover \$480.67½ for breach of an agreement and on the common money counts. The agreement for paper-writing on which it was brought was in the following words:—

"In the year 1871, on the 1st day of the month of April. Bill of Exchange [a] for premium note written and given into Shanena Vena "Mayandee Chetty of Rangoon, by us two persons Shena Shinna Meera Lebby "and Sultan Meracayar, Nacodah of the ship *Castle Eden* also of Rangoon "aforesaid, as follows:—This day we took from you on premium, the sum of "Rupees 1,000, as we have received the said sum of Rupees one thousand in "ready cash, on the safe arrival of our vessel the said *Castle Eden*, at Singa- "pore, and on production of this Bill of Exchange by your agent Pana Ravena "Mana Annamaley Chetty, our Nacodah, the said Sultan Meracayar, will "sign the same and within 11 days therefrom pay unto the said Pana Ravena "Mana Annamaley Chetty or to his order, the said principal together with "a premium thereon at the rate of 3 per cent., per mensem, from the date "hereof, and take back this Bill of Exchange, another Bill of Exchange of the "same tenor is written whichever is signed the principal and premium will be "paid and the paper taken back.

"Shena Shinna Meera Lebby.—Sultan Meracayar."

The vessel never went to Singapore, although it might have gone. The defendant did not wish it to go, as the money on the agreement would then have become payable. On the defendant refusing to proceed to Singapore, this action was brought for the breach of his agreement in not going there.

Bond, for the defendant. This action cannot lie for two reasons. 1st. There is a variance between the agreement as alleged in the declaration and the one produced. The breach of contract is alleged in the declaration in not going to Singapore, whereas there is no such contract existing in the paper produced. There is no agreement in the paper produced to go to Singapore. If the vessel was lost before her arrival at Singapore, the money could not be claimed, nor can any action be brought on this paper.

[*Hackett*, J.—This is quite a different thing—here the vessel could go to Singapore, and yet by the defendant's voluntary act, she is prevented from doing so.]

But what, if the vessel was lost before her arrival at Singapore?

[*Hackett*, J.—In that case probably the action would not lie [b], but the simple question here is, is there an implied agreement in the paper produced to go to Singapore?]

[a] See *Palmer v. Pratt*, 2 Bing 190.

[b] Per Best, C. J. It will lie on the common money counts. See *Palmer v. Pratt*, 2 Bing, 190.

I submit if the plaintiff voluntarily enters into a contract of this kind, and does not enter into any agreement to protect himself when he could have done so, he must take the consequences of the situation in which he has chosen to place himself. The agreement for payment here is conditional and not absolute, and no action lies till that condition has been performed. 2ndly. If even there is an agreement to go to Singapore, still I submit defendant is not personally liable. There is evidence that the money was paid for the vessel, and the defendant himself says so, and further that he would pay it if he had moneys belonging to the vessel. The signature of the defendant to the paper carries a mere presumption that the money was paid to him, which presumption can be and has been rebutted. *Clarke v. Percival*, 2 B. & Ad.; *Morgan v. Jones*, 1 Cr. & J. 162, s. c. 1 Tyr. 21. This latter authority is very strong in my favour.

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C. W. Rodyk, for the plaintiff. There is an implied agreement in the paper produced to go to Singapore, and as defendant has voluntarily refused to go, he is liable for the breach of it. Per Willes J., *Wilkinson v. Verity*, 6 L. R., C. P. 206, *Hochster v. De la Tour*, 22 L. J., Q. B., [N. S.] 455.

Hackett, J. That is not quite analogous, in those cases, there were express promises, and the actions were held to lie for the breach of those promises, though the time for performance had not arrived. I remember, a breach of promise of marriage case recently decided in England, where a man promised to marry a woman on the happening of a certain event; but before that event occurred, he refused to abide by his promise; an action was brought, and it was decided that the action was maintainable. [a] The question here is not exactly that; but, is there an implied agreement in this paper to go to Singapore?

I submit there is, as the money is to be paid on her arrival there.

[Hackett, J. Yes, I am aware of that; but is there a positive undertaking to go to Singapore?]

I submit there is an implied undertaking to do so, for the breach of which this action lies.

Bond, in reply. There is no contract to go to Singapore. Then, as to the second point about which nothing was said by the other side.

[Hackett, J. As to that point, I am against you. The defendant has voluntarily signed the paper, and is liable on it. The case of *Morgan v. Jones* is not in point.]

In that case there is an averment that defendant received the money, and yet it was held, this could be rebutted so as to shew that he was not personally liable.

[Hackett, J. In that case the only evidence of the receipt of the money by the defendant was the paper, and there was no further evidence on it, but here there is evidence that defendant received the money.]

The money was paid for the vessel and the defendant is sued as if he were personally liable.

[a] *Frost v. Knight*, 41 L. J. Ex. [N. S.] 78.

HACKETT, J. [Hackett, J. He signed the note voluntarily as he himself admits, and there is evidence that money passed.]
 1872.
MAYANDER There is no evidence of money having passed to him.
CHETTY [Hackett, J. He admits money passed, and that he signed on behalf of the owner, and is, therefore liable as surety at least for the owner. *Morgan v. Jones* does not touch the point. I shall consider the other point.]
SULTAN
MERACAYAR.

Cur. Adv. Vult.

January 22. *Hackett, J.* This was an action on a paper purporting to be a Bill of Exchange, and the main question argued was, whether there was a distinct undertaking to sail to Singapore—the vessel—after the arrival of which at Singapore, the money was to be paid,—had, through stress of weather to put in here and never afterwards, went to Singapore. I had at first considerable doubts as to whether there was a distinct undertaking; but now, after consideration, I think there is an implied undertaking to go to Singapore. The money, Rs. 1,000, was lent on the undertaking of defendant to pay it back to the plaintiff's agent at Singapore, on the safe arrival of the defendant's vessel there, and the production of the Bill of Exchange. It is clear, the document would be worthless, if there was no contract to go to the place mentioned. The money was lent, and the defendant can, if there is no contract, defeat the plaintiff's claim by not going. For these reasons, I think, there is an implied undertaking on the part of the defendant, that the vessel was to go to Singapore, and inasmuch as she has not, owing to his own voluntary act, but has gone to another place, he is liable for the breach of his contract. A point was also raised as to the consideration; but it is clearly not tenable. The security is given by defendant and his principal, and the defendant acknowledges that the money passed to his principal, and it does not matter whether the money was paid to him or his principal only. A surety who signs a note cannot bring parol evidence to shew he did not receive the money. Byles on bills, states that it goes so far that to a joint and several note, it is no defence to say that one of the parties was principal, and the other only surety and that the creditor knew such to be the case, and in a note to this passage he states the same principle applies as to adducing parol evidence to shew such facts, or to shew that a note is conditional when on the face of it, it is absolute. Mr. Bond relied on *Morgan v. Jones* in support of his contention, but that case is clearly distinguishable, for there, there was no consideration whatsoever, but here it is admitted. On the whole, therefore, I think there must be judgment for the plaintiff. [a]

[a] See *Sampson v. Easterby*, 9 B. & C. 505, confirmed in error 6 Bing, 664; *Shrewsbury v. Gould*, 2 B. & Ad. 487-2, Add. on Con. 969, 972. *Courtney v. Taylor*, 7. Sc. N. R. 765; *Williams v. Russell*, 1 C. B. 429; *Behn v. Burness*, 31 L. J. Q. B. [N. S.] 78; reversed in error 32, L. J. Q. B. [N. S.] 204; *Bealy v. Short*, *Ibid*, Ex. 281; *Ogden v. Graham*, *Ibid*, Q. B. 26, and contra—*Rashley v. South Eastern R. Co.*, 10 C. B. 610; followed by *Smith v. Harwick*, 26 L. J. C. P. [N. S.] 257; *Harrison v. James*, 31 L. J. Ex. 248; also see *Taylor v. Caldwell*, 32 L. J. Q. B. [N. S.] 164; and as to the second point, see *Mauley v. Boycot*, 22 L. J. Q. B. [N. S.] 265.

MYMOONAH v. HAJI MAHOMED ARIFF.

An award is not a public or a quasi-judicial document, which, if lost, must be proved only by producing a copy of it; but is the same as any other document, and can, if lost, be proved by parol evidence, or a copy, or a counterpart thereof, simply. The rule with regard to secondary evidence of an award, is the same as that with regard to a lost deed, or such like documents.

PENANG.

HACKETT, J.
1873.

January 22.

This was an action on an award made on a submission made between the defendant and the plaintiff's intestate. The defendant pleaded the general issue, 2ndly, no award made, 3rdly, that the submission was revoked before the making of the award. The plaintiff joined issue on all the pleas.

R. C. Woods, junr., appeared for the plaintiff.

Bond, for the defendant.

Hackett, J. This was an action on an award, and the main point argued was as to whether there was sufficient evidence of an award having been made, and I think, there can be no doubt that it was. The award being lost, secondary evidence of its contents was given. *Taylor on Evidence*, p. 488, states that the general rule is, secondary evidence of a lost deed may be given, and the party seeking to produce the deed, can give parol evidence or a counterpart or copy thereof, as secondary evidence of it. Mr. Bond for the defendant contended that an award was public or a quasi-judicial document, and could only be proved, if lost, by a copy of it, but I have found nothing in the books to support that view. No doubt the Court must, if there is no copy or counterpart, be satisfied with parol evidence, before it can hold that there was an award, but this is the same with regard to all other documents, and I can find no difference between an award and any other document. Having stated this, the only question now is, whether there is sufficient evidence of the award. The plaintiff's testator, and the defendant had some matters in dispute between them concerning a piece of land, and referred the matter to one Saiboo, as arbitrator. Saiboo made his award, dividing the land equally between the two. Subsequently to this a further dispute arose between them as to some accounts, and the plaintiff's testator brought an action for the amount against the defendant, but the action was stopped, and they both again went to Saiboo to arbitrate the matter. Saiboo made his award in writing, requiring the defendant to pay the then plaintiff the amount claimed. After this the plaintiff's testator, [the then plaintiff], employed one Pachee and handed over the award to him. This Pachee is a man of bad character, and was called as a witness by the plaintiff, he produced a paper which he alleged was a copy of the award made by Saiboo, but this paper, as the plaintiff herself admitted, was not a copy of the award. I must confess, I could not arrive at his motive for doing this, and the paper produced by him was a mere forgery; however Saiboo, the man who made the award, was also called, and he swears positively, he gave his decision in favour of plaintiff's testator, that it was about some accounts, and that he awarded the amount claimed. Saiboo seems a respectable and honest man, and gave his evidence in a most straightforward and impartial

HACKETT, J. 1873. manner, and I therefore think, I am justified in taking his account of the award as true. The lands having been partitioned, the only question now remaining to be decided is, what was the amount awarded to plaintiff's testator, and with respect to this also, I think, I must take Saiboo's account of it as true. There will, therefore, be judgment for the plaintiff for the amount claimed. [a]

MYMOONAH
v.
HAJI MA-
HOMEDARUFF.

MOOROOGAPAH CHETTY v. LIM HONG & ANOR.

PENANG. A defendant in an action under Act V. of 1866, who has been arrested before judgment, is entitled to his discharge after the seven days time given by the Act has expired, although the plaintiff has not, and is unwilling to obtain judgment; and the order of arrest on which the defendant was arrested, authorised him to be arrested and kept in custody for six months, or till the further order of the Court.

HACKETT, J. 1873.
February 25.

This was an application by the defendants to be discharged from custody. They had been about a fortnight or more previously, arrested by an order of arrest issued at the request of the plaintiff under Ordinance 22 of 1870, sec. 8. The action was under Act V. of 1866, the "Summary Procedure Bills of Exchange Act." The affidavit on which they grounded their motion, after stating in the first two paragraphs that an order of arrest was issued against them, on which they were arrested, stated, in the third paragraph, that the seven days time given by the Act and summons, had expired; that they had not obtained leave to appear and defend, and that the plaintiff was at liberty at any moment to sign judgment, although, at the time of the application, he had not done so.

D. Logan [Solicitor-General], for the plaintiff shewed cause. This is an application by the defendants to be discharged out of custody, and we are now called upon to shew cause why such an order should not be made. I submit that the affidavit does not disclose such a state of facts as to compel us to make an answer to it.

[*Hackett, J.* The affidavit rests on the ground that the plaintiff is entitled to judgment, the seven days time having elapsed.]

Yes; but we have not as yet had judgment, though we are entitled to it. The defendants are not entitled to their discharge until we have obtained judgment. The order of arrest has not as yet expired—six months was the time mentioned therein, and we are not obliged to sign judgment, no sooner the seven days given by the summons have expired,—we are at liberty to enter judgment whenever we like.

[*Hackett, J.* Yes, but the Court is at liberty to discharge the defendants, when it thinks the plaintiff is acting improperly.]

The defendants can only be discharged after we have obtained judgment, until we have done so, they must be detained.

[*Hackett, J.* You are entitled to enter judgment, and have not as yet done so. You cannot, I think, by your own unwilling-

ness to enter judgment, keep the defendants in custody, when immediately after judgment, they are entitled to their discharge. The Act only allows a defendant to be arrested before judgment; not to keep him in custody for the debt, but simply to secure his presence. Our Act is not quite so clear as the English one, as the framer has made a great many additions to it; but from the English Act it clearly appears what is meant. [a] I don't think you have any right to detain them, and it would be contrary to the spirit of the Act to do so. I think, the affidavit is perfectly good, and that you are bound to answer it.

HACKETT, J.
1873.

MOOREOGA-
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& ANOR.

The notice of the application having been served on the plaintiff, late on the previous evening, time was allowed to his Counsel.

The defendants were eventually discharged from custody. [b]

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In an action by a judgment-creditor to redeem three mortgages, and to have the fourth declared void as having been taken after judgment in plaintiff's favour,—the bill of complaint stated, that defendant had told plaintiff he had a promissory note for the money, but took the fourth mortgage as a better security, but defendant, at time of taking such mortgage, had notice of the action pending. The bill did not deny the consideration for the note. On demurrer, it being said by plaintiff that there was no consideration for the note, and the defendant asserted that there was,—the Court overruled the demurrer, and ordered the defendant to answer, so as to do complete justice between the parties.

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Seemle. It is no fraud for a creditor, secured by a promissory note, to take a mortgage in lieu thereof, even if meant to defeat a judgment creditor, of such his debtor, either at law or in equity.

Query. Is notice of an action pending constructive notice of the judgment?

Query. In a suit by a judgment creditor against a mortgagee, to redeem the mortgage, must the mortgagor [the judgment debtor], be made a party?

Query. Whether the prayer "that justice may be done as the case shall require," is equivalent to a prayer for general and further relief?

This was a suit on the equity side of the Court, wherein the plaintiff sought as a judgment creditor, of one Shella Merican, to redeem a certain piece of land over which the defendant held four mortgages. The plaintiff was willing to redeem the first three, but not the fourth, which he alleged, was void, as having been made after he had obtained judgment. The defendant had not at the time of the taking of the fourth mortgage, actual notice of the judgment, but had, as the plaintiff alleged, and he denied, notice of the action pending between him [plaintiff] and the said Shella Merican, which notice he contended, was a constructive notice of the judgment. The defendant had advanced the money to Shella Merican on a promissory note, long previous to the action by plaintiff had been commenced, and took the fourth mortgage in lieu only of the promissory note at the time aforesaid. The bill stated these facts, except as to the promissory note—as to which

[a] See *Hume v. Druff*, 8 L. E. Ex., p. 214.

[b] This case was under the Summary Procedure Bills of Exchange Act, which has since been repealed; but, as according to the present practice, judgment can in most cases, be obtained after eight days, the same principle probably, would be held applicable.—J. W. N. K.

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it stated, that defendant had informed plaintiff that he held a promissory note for the money, but took the mortgage only as a better security. It did not allege that there was no consideration for the note or any other thing to effect the validity of same, but alleged that no money passed on the mortgage. It did not however pray that it may be declared void at least as against him, nor was there a prayer for general relief. To this bill the defendant demurred generally for want of equity. [a]

C. W. Rodyk, for the defendant. Though no money passed on the mortgage, yet it was not voluntarily made as the defendant by taking it, lost the security of the note which then became merged in the mortgage, and the money due thereon became due on the mortgage.

[Hackett, J. I will ask Mr. Ross to support his bill. As the case stands at present, I don't see that the plaintiff has any equity, and if he can shew that he has, then I will call on you.]

Ross, for the plaintiff. The plaintiff as judgment creditor has a claim on the land.

[Hackett, J. Where do you find that?]

I have not looked up to see where I can find it, but I take it as a general principle that a judgment creditor has such right, and, I think, the other side will admit this. [b] The bill alleges that defendant before taking the fourth mortgage, knew an action was pending against the mortgagor, and this, I submit is sufficient constructive notice so as to effect the mortgage. *Le Neve v. Le Neve*, 2 Wh. & Tudor's L. C. in Eq., 43. Anything that is sufficient to put a reasonable man on his guard, is considered a sufficient constructive notice in Equity. *Jones v. Smith*, 1 Hare. The plaintiff is clearly entitled to have the mortgage set aside as against him.

Rodyk. The mere fact of notice of the action pending, [admitting it for the purpose of this argument] is not sufficient. *Robinson v. Davison*, 1 Bro. C. C. 63, is in point. *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Sorrell v. Carpenter*, *Ibid.* 482, and *Cooke v. Wilton*, 30 L. J. Ch. [N. S.] 467, are also to the same effect. [c] In *Robinson v. Davison*, the third mortgagee, who was a defendant with the first mortgagee at the suit of the second mortgagee, while the action was pending, bought in the first—and it was held by the Lord Chancellor, that by so doing he had gained a priority over the second. The same was held in *Brace v. The Duchess of Marlborough*. In *Sorrell v. Carpenter*, the Lord Chancellor said: "Where there is a real and fair purchaser without any notice, it is a very hard case especially in a Court of Equity, to set such a purchaser aside; and there being some defect in part of the proof in deraigning the plaintiff's title, I shall refuse to give the plaintiff leave to amend or make any new proof after publication." The defendant, as the Bill admits, was a creditor

[a] The objection for want of parties was raised *ore tenus*, see *Pratt v. Keith*, 33, L. J. Ch. [N. S.] 528. A demurrer *ore tenus*, however, will not be allowed to part of a bill—*Shepherd v. Lloyd*, 2 Y. & J. 490.

[b] See *Smith Man. of Eq. & 2 Sp. Eq. Jur.*

[c] See generally *Marsh v. Lee*, 1 W. & T. L. C. in Eq., p. 406 & notes thereto.

of the mortgagor, when he took the fourth mortgage. He held a promissory note and therefore, the making of the mortgage, even if made to defeat plaintiff's claim, is not such a fraud on him as to make the mortgage void. *Sm. Man. of Eq.* 95, *Alton v. Harrison*, 4 L. R. Ch. App. 622. *Harman v. Richards*, 22 L. J. Ch. [N. S.] 1106. [a] There is no prayer that the mortgage might be declared void, and, as there is no prayer even for general relief, this relief, therefore, cannot be granted even if the Court thought the mortgage void. *Hunter's Suit in Eq.* 17, *Cockerell v. Dickens*, 3. Moore's P. C. cases p. 98. [b] As these prayers are not here, and the mortgage cannot be declared void, the plaintiff, if he wishes to redeem at all, must redeem all four or none. *Vint v. Padgett*, 28 L. J. Ch. [N. S.] 21; *Sish v. Hopkins*, Ambler 793. The defendant had a prior legal estate by having the first three mortgages and, therefore, the plaintiff has no right to redeem. 2 *Sp. Eq. Jur.* 662, citing *Barratt v. Blake*, 2 Ball. & B. 357. Lastly, the Bill is bad for want of parties. Shella Merican, the mortgagor, having an interest ought to have been made a party. 2 *Sp. Eq. Jur.* 695-6-703. For these reasons the demurrer must be allowed.

Ross. I think the last objection as to want of parties, perhaps, is the only one that may hold good. The others, I submit, are untenable. In *Robinson v. Davison* and *Brace v. The Duchess of Marlborough*, the principle there laid down, is a well known and common thing. The third mortgagee has always a right to buy in and tack on to himself the first mortgage, and thereby gain priority over the second, but that does not apply. The cases don't touch the present question in the least. If the defendant had constructive notice of our judgment, that will be sufficient to postpone his fourth mortgage. The case of *Cooke v. Wilton* does not apply, if anything, it is in our favour. It is said that the deed is not void, simply because it was made to defeat plaintiff's claim, and *Sm. Man. of Eq.* 95, was cited, but, if we turn to page 93, we will see that the very contrary is stated there. *Twyne's Case*, 1 Sm. L. C. is the leading case on this subject, and at page 19 in the notes, the case of *Booth v. Smith*, is cited as a very important case on the subject. There it was held, that a conveyance made by a father to his son [in consideration of the son maintaining the father] of all his property, and the conveyance was made to defeat the plaintiff, a judgment creditor in a suit brought by the plaintiff against the son to set the conveyance aside, that the same was void, and was accordingly set aside. This case, I submit, is exactly in point.

[Hackett, J. In that case, the son alone, and not the father also, —was the defendant at the suit of the judgment creditor.]

Yes, and I therefore submit this case is also decisive of the question of want of parties. *Alton v. Harrison* is entirely a different case. There the creditors to whom the mortgage was made had no security for their debt, but the present defendant held a promissory note for the money. The mortgage here is altogether

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[a] Also see *Bowen v. Brambridge*, 6 C. & P. 110, & Mayne on the Penal Code, pp. 152-55, where this is treated as a criminal offence.

[b] See also *King v. Rossett*, 2 Y. & J. 33, *Topham v. Constantine*, 1 Taun. 135, *Mellish v. Richardson*, 12, Price 530.

HACKETT, J. 1878. **MUNGOOTER** **MEERA NINA** **v.** **ATHEAN.** fraudulent between the defendant and the debtor, as well as between him and the judgment-creditor. *Booth v. Smith.* We have not, it is true, prayed that the mortgage might be declared void, but if we did this, and it was so declared, we would be depriving the defendant of his money, but if it is necessary that it should be declared void, then this will be done under the prayer for general and further relief, but again, it is said, there is even no prayer for general relief; this, however, is not correct. No doubt, there are no words in the bill like "further and other relief," but there is a prayer "that justice may be done as the case shall require," and I submit these words are sufficient to let in the relief wanted, as these words refer to the same subject as the general prayer for relief, would have if it had been inserted. The objection that we must redeem all or none, does not hold here as in England, it is necessary that that should be so, as there is always a foreclosure suit before the property is sold; but here such a thing is never done, if the debt is not paid, the property is there and then sold without any further steps being taken. It is most unfair here for the defendant who already held a security for his money to take a mortgage, especially as we had judgment and wanted to satisfy the same.

[*Hackett, J.* No, it is not at all unfair—by your contention it would be unfair for a creditor to go to his debtor against whom another has judgment: and say to him, pay your debt to me at once which is there and then paid.]

There, there would be a consideration for paying off the debt—the debt would be extinguished, but here there is no consideration. The plaintiff had a security, and took another, and a better one. The debt was secured on the note, no money was paid on the mortgage, what consideration was there for the debtor giving defendant a better security. [a]

[*Hackett, J.* It is a thing of every day occurrence.]

Fraser v. Johnston, 4 De Gex and Jones, also shews this mortgage is void.

[*Hackett, J.* I see the bill does not deny that there was consideration for the note.]

No. This demurrer must be overruled. *First*, defendant had sufficient notice of our judgment; *secondly*, there was no consideration for giving the mortgage; and *thirdly*, the question as to want of parties is settled by *Booth v. Smith*, viz.: the execution or judgment creditor against the mortgagee.

Rodyk. I only wish to add a few words. *Robinson v. Davison* is directly in point to shew that notice of the action pending amounts to nothing at all. In all the cases quoted by the other side where the mortgages on conveyances were held void, and therefore set aside, were not mortgages or conveyances made to creditors. *Alton v. Harrison* is a direct authority in our favour, the judgment is plain on the subject. L. J. Gifford in this case says, in citing the judgment of the Vice-Chancellor "in this as in all other cases "of the same kind, the question is as to the *bona fides* of the tran-

[a] See *Goodricke v. Taylor*, 2 De Gex J. & S. 135.

"saction. If the deed of mortgages and bill of sale was executed by Harrison, honestly, for the purpose of giving a security to the five creditors and was not a contrivance resorted to for his own personal benefit, it is not void, and must have effect." As to the question regarding the prayer, I submit the words, "that justice may be done, as the case shall require," is not sufficient. In a case reported in one of the Law journals, that I have not managed to lay my hands on, a prayer for general relief was omitted, and the Court refused to grant any relief than that expressly prayed for, and refused leave to amend. The bill does not allege, that there was no consideration given for the note, and as it admits there was a note, it must be *prima facie* taken to be for good consideration till the contrary is alleged and proved. On these grounds, I submit, the demurrer must be allowed.

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March 14. *Hackett, J.* In this case the law authorities are against the contention of the plaintiff. By them, it seems to be no fraud for a debtor against whom a judgment is obtained to prefer a particular creditor, and if any mortgage or other deed is made by him to such particular creditor, even with the intention of defeating the judgment creditor, still the mortgage or deed will be good. There are two cases decided in the Court of Exchequer which are very strong on the subject. One, is *Darvill v. Terry*, 30 L. J. Ex. [N. S.] 355. [a] By these cases, it is clear, the mortgage here is valid, and regular in law, and I don't know whether the plaintiff has a better right in equity than he has at law. I apprehend that in such a case as this, equity will follow the law. The only question here is, whether there really was any consideration for the promissory note, in lieu of which the mortgage was taken. It does not appear on the bill or demurrer, that there was any consideration; however, the bill does not say there was none, but simply says no money passed on the mortgage. The law on the subject, as already mentioned, is not only clear on the authorities, but appears to me to be so, by common sense. The person taking the mortgage being a creditor, is a sufficient valuable consideration to support the mortgage, and such preference of such creditor is not fraudulent. For instance, a creditor who says to his debtor "you have given me no security for my money but a note, and so as to protect myself, you had better give me a mortgage," which the debtor accordingly does—such mortgage will be good, as there is sufficient consideration to support it. However, on the facts of this particular case, I would like to consider the matter over again before giving judgment.

March 22. *Hackett, J.* said that so as to go into the question of the consideration of the note, and as the petition asserted that defendant had knowledge of the action pending, he thought the best plan was to overrule the demurrer, and for the defendant to answer, the costs being costs in the cause.

Demurrer overruled.

[a] See generally, Mayne on the Penal Code, p. 154.

FRUCHARD v. SCHMIDT & ORS.

SINGAPORE.

SIDGREAVES,

C. J.

1873.

March 3.

Where a vessel is chartered from one port to another, and the charter-party provides that the vessel should, at the port of destination, be consigned to certain agents, whose commission for inward and outward cargo is also arranged at certain rates, it is not incumbent on the master to take a return cargo from such port of destination; but if he decides to do so, he must take his return cargo through the agents named, and no other.

Therefore where the master under such a charter is undecided whether he would or would not take in such return cargo, but at the same time held out reasonable expectation to such agents that he would, and the agents in faith of such acts, "circulated" the vessel, and obtained an offer to ship cargo in her, but the master subsequently changed his mind, and left the port without any return cargo, whereby the efforts of the agents were rendered abortive,

Held, the agents were not entitled to commission at the rate named in the charter-party.

Query. Could the agents have sued on a *quantum meruit*?

The facts of this case are fully set out in the judgment, and need no opening statement.

Cur. Adv. Vult.

On this day judgment was delivered by

Sidgreaves, C. J. This was an action by the owner of the ship, the French barque *Tranquebar*, against the defendants for \$1,077.27 for inward freight as per charter-party, and other incidental charges, the amount of which, and their liability to pay which, is not disputed by the defendants, who have paid the amount claimed into Court, less a sum of \$423.25, which they claim to retain by way of set-off for commission due to them on outwards estimated charter at 92½ francs. The *Tranquebar* was chartered at London, through Messrs. Galbraith, Stringer, Pembroke & Co., to Messrs. Wright Brothers and Company, of London, for a voyage to Singapore, and the charter-party contained this clause: "The ship to be consigned to Freighters' Agent at the port of discharge, inwards paying two per cent. on amount of freight due under this charter-party, to be deducted by charterers from first payment, and outwards on the usual and customary terms." The *Tranquebar* arrived at Singapore on Saturday, the 26th October, and was put by the captain into the defendants' hands, they being the consignees—the freighters' agents under the charter-party. On the following Monday, they "circulated" the ship in the usual way, and amongst other offers of charter had one from the firm of Behn, Meyer and Company, for a voyage from Bangkok to Marseilles at 92½ francs "all round," that is, inside and outside the bar at Bangkok. The captain, however, did not avail himself of this offer; he entered into negotiations with Messrs. Hinnekindt, who could have procured him a charter at 90 and 95 francs, from Bangkok to Marseilles, but finding that in addition to the five per cent. which the Messrs. Hinnekindt expected, the defendants also claimed five per cent. commission on the same transaction, he refused to conclude the charter, and finally left Singapore "seeking," without having concluded any charter at Singapore through the defendants or anybody else. The question is, then—are the defendants—having done all that they could to procure a charter, and having, as they allege, offered the captain the best charter

procurable at Singapore, entitled to charge five per cent. commission, as though the charter had actually been accepted? Some evidence was given of the custom in Singapore regarding transactions of this sort, and it was stated to amount to this, that where merchants have been employed to "circulate" a ship, they are *de facto* established as agents to procure a charter-party, and that they are entitled to charge their commission whether the charter-party is effected through them or anybody else. It will be observed, however, that in this case the defendants wish to push the custom one step further, and to establish that where they have done all that they could, and have offered the best charter procurable, the captain is either bound to accept it, or if not, they are entitled to charge their commission upon it all the same as if he had. If they are not entitled to claim a full commission upon this eventuality happening, but can only sue upon a *quantum meruit* for work and services actually performed, then they cannot set-off the value of such work and services in this action, inasmuch as the very nature of a set-off necessitates an amount already ascertained before hand.

It is quite clear, however, that whatever may have been the understanding or agreement between the charterers and the defendants as to the employment of the defendants, for the purpose of obtaining a return cargo, such understanding or agreement was not binding on the plaintiff, and it was quite optional on the part of the master whether he accepted a charter in Singapore or not, although if he had done so, it seems that the defendants would have been entitled to procure it. In *Cross v. Pagliano* [6 L. R. Ex. p. 9,] an almost precisely similar question arose. The action was on a charter-party made between the plaintiffs, the charterers, and the defendant, the master of the ship, whereby, it was among other things, agreed that, for a certain freight payable by the plaintiffs to the defendant, the ship should proceed with a cargo to San Francisco, and should be then and there consigned to the agents of the plaintiffs, the defendant paying commission "inward and outward,"—the breach alleged was that the defendant did not consign the ship to the plaintiffs agents, and did not pay commission inward and outward. The captain, it appeared, had actually entered into a previous contract to bring home a cargo of goods from Selina Cruz in Mexico to Hamburg, and after discharging the plaintiff's cargo at San Francisco, to which port the ship had proceeded in accordance with the charter-party made with the plaintiffs, she sailed in ballast for Selina Cruz, where the cargo was obtained. The plaintiffs' agents were not employed in obtaining the cargo, they had offered the captain a cargo for Europe, but he being bound under his earlier contract, declined to accept it.

It was held by C. B. Kelly, Bramwell B., and Pigott, B. that the provisions in the charter-party did not impose on the defendant an obligation to accept a homeward cargo for the United Kingdom from the plaintiffs' agents at San Francisco, but merely bound him, if he had determined upon taking a return cargo on board there, to employ them to procure and ship it. In this case, however, the defendants claim to retain from the

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SIDGEMAN, account owing from them, to the plaintiffs, the amount of their commission, as though the offer made by them, had been accepted, and this although the Captain has declined it, and has sailed off to procure a cargo elsewhere. In *Read v. Rann*, [10 B. & C. 438], the law upon this subject is stated as follows:—

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“A ship-broker who has procured a bargain for the hire of a vessel is, by the usage in the City of London, entitled to receive from the owner a certain commission on the amount of freight, if the contract is perfected, but not otherwise.”

“Held, that where a broker had negotiated the hire of a vessel, and a memorandum for a charter was signed by the parties, but the bargain afterwards went off, and the ship was not employed, the broker could not maintain an action against the ship-owner to recover the commission or a compensation for his work and labour.”

In *Broad v. Thomas*, [7 Bing. p. 99,] the defendant had employed the plaintiff to procure a charter for the ship *Betsy*. The plaintiff found one Emden who was willing to charter the *Betsy*, and signed a paper containing the terms upon which the ship was to be hired; but before the charter-party could be drawn up, the defendant refused to go on in the business, whereupon the plaintiff commenced this action to obtain payment for his trouble. At the trial before Tindal, C. J., witnesses were called on both sides to shew what was the mercantile usage in such a case. Their testimony was conflicting; but the more respectable stated that the broker was entitled to no remuneration in such a case. The Chief Justice thought that the defendant had a right to exercise an option whether he would engage with the proposed charterer or not, and that as no charter-party was signed, there was no contract to bind the defendant. He left it, however, to the jury to determine whether there was any, and what, custom in such a case. A verdict having been found for the defendant, a new trial was moved for, on the ground that whatever the custom might be when the contract was broken off, by unavoidable accident, the broker ought to be remunerated for his trouble where the business was broken off by the defendant himself without assigning any reasonable cause; and that, therefore, the jury should have been directed to enquire whether the defendant's refusal to proceed in the charter-party with Emden had been reasonable or unreasonable. In *Hammond v. Holiday*, it was laid down by Best, C. J., that if the duties of a sworn broker be executed in such a manner that no benefit results from them, he is not entitled to recover either his commission or even a compensation for his trouble. Here, the plaintiff procured for the defendant the benefit of a contract with the charterer, for Emden was bound to proceed if the defendant required him.

Tindal, C. J. “If the question were again to go before a jury, it must be left to them on the custom. The rate of payment in contracts of this kind which are brought to a conclusion, seems to be higher than would be requisite, as an equivalent for the trouble of conducting the particular transaction. It is probably on that ground that the custom has arisen to allow nothing when the contract is incomplete.”

It is quite clear, therefore, that the defendants cannot in this case claim legally to set off the commission to which they claim to be entitled, and it is also clear that even if they were entitled to sue upon a *quantum meruit*, they could not make that a valid set-off against the plaintiff's claim. The verdict will, therefore, be for the plaintiffs for the amount claimed.

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In re VAN SOMEREN.

A person under twenty-one years of age, will be permitted to be examined, as to his fitness to be a Solicitor, although he will not be admitted to practice before that age.

Query. What, if there be special circumstances which make it beneficial for him to be admitted before attaining twenty-one?

Semle. The mere fact, that an Ordinance is likely to come into operation, whereby, he will be kept back for eighteen months, or thereabouts, is not such a special circumstance, as will cause the Court to allow him to be admitted.

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HACKETT, J.
1873.
March 14.

This was motion made on behalf of the above-named petitioner, R. G. Van Someren, a solicitor's clerk, for the appointment of examiners, as to his fitness to be admitted to practice, as an Advocate and Solicitor of the Court. The petitioner required, but one day to attain his majority.

B. *Rodyk*, in support of the motion, contended that, as Ordinance 5 of 1873, was about to be passed, requiring 5 years' service before admission, and as the petitioner had only been 3 years under articles, and a little over a year without, he would, if the Ordinance came into force, be thrown back for eighteen months, or thereabouts, thereby inflicting great hardship on him, as he would, within twenty-four hours, attain his majority. This, he submitted, was a special circumstance, which would cause the Court to allow the petitioner to be examined and admitted—though at present the admission was not asked for—as he was not yet twenty-one; and cited *Ex-parte* Tebbs, 9 Dowl. P. C. 151; and *Ex-parte* Bousfield, *Id.* 616, s. c. 10, L. J. Q. B., [N. S.] 361.

R. C. *Woods*, jr., on behalf of the Bar, opposed the motion, as the petitioner was not of age, and contended that this being the case, no order appointing examiners even could be made, and cited *Ex-parte* Steele, 33. L. J. Q. B., [N. S.] 326. [*a*]

Hackett, J. held that the petitioner could be examined, but not admitted, [except under special circumstances, as in the two exceptional cases cited], before he had attained the age of twenty-one. The mere fact of an Ordinance coming into operation, did not, however, amount to such a special circumstance, as would cause the Court to break through its Rules, as the petitioner was still young, and the fact of his waiting eighteen months was not such a very great hardship, as he could then apply for admission. The motion for examination, was accordingly granted, but on turning to the petition and finding it to be one for *admission* and *enrolment*, his Lordship refused the application, but allowed the petition to be amended, and the motion renewed.

Order accordingly.

[*a*] See *Ex-parte* Cragg, 6 Dowl., 256.

OH YEAN HENG v. EASTERN EXTENSION AUSTRAL- ASIAN AND CHINA TELEGRAPH CO., LD.

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An advertisement in English, published in a local newspaper, is no notice to a Chinaman who is unable to read that language.

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So where the plaintiff, a Chinaman, after such advertisement, received rent for his premises, of persons who he still then believed to be those he had rented his premises to, and such receipt of rent was, after certain breaches, of covenant,

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Held, that there was no waiver of the breaches, as there was no notice of the change, and the advertisement did not, under the circumstances, amount to notice.

A covenant not to assign is a covenant that runs with the land, and the assignee of the reversion may take advantage of any breach of it.

Where a Company takes a lease of certain premises and covenants not to assign, and subsequently, during the term, is amalgamated with another Company upon which the original Company is dissolved, and the newly formed Company, by the same manager and clerks, occupy the premises,

Held, a breach of the covenant.

B. by deed, leased certain premises to the B. I. E. Telegraph Company for a term of 21 years, which lease contained covenant by the Company not to assign without the consent of B. or his assigns. The B. I. E. Company, in conjunction with the C. S. Telegraph Company and B. A. Telegraph Company, amalgamated, and formed themselves into a new Company, called the E. E. A. & C. Telegraph Company [defendants]. On the amalgamation, the three first companies were dissolved and wound up, but the premises were continued to be occupied by the same manager and clerks of the original company, who had become the servants of the newly formed Company. B. assigned the reversion in the lease and premises to the plaintiff, who, as soon as he found the change of companies, sued the defendants, the newly formed Company, in ejectment.

Held, he was entitled to recover the premises as assignee of the reversion.

The Statute 32 Hen. VIII., c. 34, extends to this Colony.

Ejectment for certain premises in Pitt Street. It appeared that a Mr. Bishop, the former owner of the premises in question, by deed, dated 7th October, 1871, had leased them to the British India Extension Telegraph Company, for a period of 21 years: that in 1873, the British India Company had amalgamated with the China Submarine and the British Australasian Telegraph Companies, and formed themselves into a new Company called the Eastern Extension Australasian and China Telegraph Company, [the defendants] and under that name the defendants had occupied, and were occupying the premises aforesaid: that as soon as the amalgamation was effected, the fact was published in the *Pinang Gazette*, but in the English language only. On the amalgamation being effected, the three original companies were dissolved and wound up, at least, in so far as their business in the East, was concerned. Bishop, on the 6th April, 1873, sold and conveyed the reversion in the premises to the plaintiff. The plaintiff thereafter collected rents of the defendants, but was not aware that there had been a change, and in fact, his bills to the last, were headed against the original British India Extension Company. The plaintiff was unable to read English, and swore he had no knowledge of the change until receipt on February, 1874, of a letter from a Mr. Gott, the Superintendent of the defendant's Company, intimating the fact of amalgamation to the plaintiff. The plaintiff, from that time, refused to receive any further rent from the defendants, and brought this action to recover the premises, by reason of the breach of the covenant to assign. The premises continued to be occupied by the same Superintendent and Clerks of the British India Extension Company,

though, since the amalgamation, they did so as servants of the newly formed Company, the defendants. The pleadings not sufficiently and distinctly raising the points at issue, the above facts were shortly agreed on by the parties, and the following questions were raised for the determination of the Court.

1st.—Was there a breach of the covenant in the lease, not to assign without license?

2nd.—If so, had the plaintiff a right to sue?

3rd.—If he had, was ejectment the proper form of action?

4th.—If there was no breach of covenant, were the defendants, independently thereof, wrongfully in possession?

5th.—Had the plaintiff waived the forfeiture by acceptance of rent after publication of the amalgamation in the *Pinang Gazette*.

Bond, for plaintiff. The most convenient question to argue in the first place, is the second. Has the plaintiff the right to sue? At common law, no doubt, the plaintiff could not bring this action, but the Statute 32, Henry VIII, c. 34, gives to the Grantees and Assignees of the reversion, the same rights, as the original lessor, and the Court will have no hesitation in holding that that Statute applies to the colony, as, it is an enabling and relieving Statute. It has been settled, however, that the right of re-entry, and consequently of bringing ejectment, is confined to breaches of covenants running with the land, and the question, therefore, here is, is the covenant not to assign without license, a covenant which runs with the land. Formerly some doubts existed on this point, and indeed, it is laid down in text books, *Cole on Ejectment* and *Woodfall on Landlord and Tenant* that such a covenant is purely collateral, and does not run with the land. However, all doubts, on the point have been put at rest by the decision of the Court of Queen's Bench, in the case of *Williams v. Earle*, L. R. 2, Q. B. p. 739. In this case, after a very full argument in which the authorities in support of such a covenant being merely collateral were cited, it was held by the Court, [Blackburn & Quain, J. J.,] that a covenant not to assign without license is a covenant touching the thing demised, and therefore, a covenant running with the land. This case was cited in support of the same position in the argument in *Varley v. Coppard*, L. R. 7, C. P. 505. This argument extends to the third question, as to the proper mode of suing; the grantee of the reversion having, according to the Statute, and the decision in *Williams v. Earle*, the right of bringing ejectment, instead of suing for breach of covenant.

Secondly, there has been a clear breach of covenant not to assign, under-let, or part with the possession of the premises without license.

The defendants, a Company of whose existence the plaintiff was ignorant, until February, are found in possession of the premises. It is true, that we are not in a position to prove an actual assignment to them, but the Court will presume that they have come into possession, as assignees or under-tenants. *Doe d. Hindly v. Rickerbey*, 5 Esp. 4; *Doe d. Batten v. Murless*, 6 M. & S. 110; *Doe d. Morris v. Williams*, 6 B. & C. 41. As to

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what constitutes a breach of such a covenant, there are several cases which, though not altogether similar to the present, yet bear some analogy to it. In *Doe d. Dingley v. Sales*, 1 M. & S. 397, it was held that, where the defendant without license, entered into partnership, with a person to whom he granted the use of the back-chamber, and some other parts of the premises exclusively, and of the rest jointly with the defendant, that the lessor was entitled to re-enter.

In *Greenslade v. Tapscott*, 1 C. M. & R. 55, the lease contained a stipulation, that for every one or less quantity of land, which the lessee should allow to be occupied by any other person without the consent of the landlord, he should pay an additional rent. The lessee, without such consent, allowed some persons to use small portions of the land for the purpose of raising a potato crop. It was held, that this was a breach of the covenant, though it was proved to be the custom of the country, and the lessee had undertaken in the lease to occupy the land according to such custom. In *Doe d. Ambler v. Woodbridge*, 9 B. & C. 376, letting some rooms, which a covenant forbade the use of, except by the lessee, and his family, was held a breach of such a covenant. In *Holland v. Cole*, 1 H. & C. 67, an assignment to trustees for the benefit of the lessee's creditors was held a forfeiture of the lease, a covenant not to assign without license being contained in it. In *Tatem v. Chaplin*, 1 H. Bl. 133, breach of a covenant to reside on the premises, was held a forfeiture of the lease. In *Varley v. Coppard*, L. R. 7 C. P. 505, *Willes, J.*, held that, the assignment by one partner to another of his share in the joint-tenancy, was a breach of such a covenant, and remarked that it was unnecessary for him to decide, whether, the mere taking in of a partner would constitute such a breach. The case of *Doe d. Norfolk v. Hawke*, 2 East 481, is also an authority in our favour. There are two cases where marriage, which is clearly forming a partnership, has been held to be an indirect breach of covenant and to cause a forfeiture. The first *Charnley v. Winstanley & wife*, 5 East 266, is a very curious case. There B., the wife, had covenanted with A., before her marriage, to leave some accounts to arbitration, and to abide the award. B. married before the award was made, which was that B. should pay to A. a certain sum; B. did not pay, and it was held that as B. had by her own act, *i.e.*, marriage, put it out of her power, to perform the award, the covenant to abide the award was broken. In *Craven v. Brady*, L. R. 4, Ch. App. 296, a testator devised real estate to his wife for life, with proviso, "that, if she should do, make, or execute any deed, matter, or thing, whereby, she should be deprived of the rents, profits, or the power, or right to receive, or the control over the same, so that her receipt alone should be a sufficient discharge for the same, her life estate should cease and determine." The wife married again without settlement, and the Lord Chancellor held affirming the decision of the master of the rolls, that, though there was no actual assignment, a breach of the condition had been committed, and the life estate was forfeited. It is admitted that the British

India Extension Telegraph Company, [the original lessee] has been dissolved, and so most probably have the other two Companies, out of which the present defendant Company, has been formed. Can it be said then for one moment, that the present Company is the same, as the original lessee. Not only is there a change of name, but the operations carried on are different—there are different directors, a different body of shareholders, different amount of capital. As to the light in which Courts look upon the effect of the dissolution and amalgamation of Companies, *Sterling v. Maitland*, 5 B. & S. 840, is a very important case. There the United Kingdom Life Assurance Company covenanted with the plaintiff for valuable consideration to appoint him their agent in Glasgow, jointly with one Seton, and, if they displaced Seton from the agency, to pay the plaintiff a certain sum. Ten years afterwards, the United Company, transferred its business to the North British Mercantile Insurance Company, wound up their affairs, and dissolved themselves, and, on action brought by the plaintiff to recover the covenanted sum, it was held that the transfer, the winding up and dissolution, constituted a displacement of Seton within the meaning of the covenant. Cockburn, C. J., in giving judgement said: "I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative. I agree that if the Company had come to an end by some independent circumstance, not created by the defendants themselves, it might very well be that the covenant would not have the effect contended for; but if it is put an end to by their own voluntary act, that is a breach of covenant for which the plaintiff may sue. The transfer of business and dissolution of the Company was certainly the act of the Company itself, so that they have, by their act, put an end to the state of things under which alone this covenant would operate." This is a very strong case for the plaintiff, and on the principle enunciated in it, I would contend, that, if the Court will not presume, as I submit, it will, that the defendants are in possession as assignees or under-tenants, the above case will entitle it to hold that they are in as pure trespassers, and therefore wrongfully in possession independently of the covenant—which would answer the 4th question submitted to the Court.

It may be said, that the plaintiff is not placed in a worse position by the defendants becoming his tenants, but this consideration, I submit, does not affect the question. It is on the ground, that it is impossible to place the parties in the same position, that Courts of Equity decline to grant relief against a forfeiture for a breach of covenant not to assign without licence. *Saunders v. Pope*, 12 Ves. 292; *Hill v. Barclay*, 18 Ves. 63. In the latter case, Lord Eldon said: "There is no difference between covenants thus resting in damages, and another against the breach, of which it is admitted, the Court, will not relieve, a covenant not to assign without licence; upon which, it is clearly

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The only remaining question is, has there been a waiver of the forfeiture by the acceptance of rent by the plaintiff, after the publication of the amalgamation in the *Pinang Gazette*. If the plaintiff had accepted rent, knowing of the amalgamation, the forfeiture would, without doubt, have been waived, but we have the fact admitted, that he has sworn positively, that the first intimation he had of the amalgamation, was on the 4th February, when he received a memo. from Mr. Gott, requesting his consent to an assignment of the lease. Now the defendant will hardly contend, that a publication in the *Pinang Gazette*, a paper published in English, which the plaintiff, a Chinese gentleman, does not take in, and could not read, if he did, is a sufficient publication to him, and it is clearly laid down, that acceptance of rent without knowledge of the breach is no waiver. *Doe d. Sheppard v. Allen*, 3 Taunton 78, *Roe & Gregson v. Harrison*, 2 T. R. 425.

Ross, for defendants. The first question raised by the special case for the Court's decision is, has the plaintiff a right to sue? It is submitted he has not. He is only the assignee of the reversion, and as such, can have no right to sue unless it be shown that the covenant not to assign is one which runs with the reversion, or, even admitting that it did, that the Statute of 32 Henry VIII. c. 34, applies to the Straits Settlements. That it is not a covenant running with the reversion is laid down in *Cole on Ejectment* [ed. 1857] 405, & 438. *Woodfall on Landlord and Tenant*, p. 288, is to the same effect. The case of *Stephen v. Copp*, 4 Ex. L. R. 20, might, at first sight, seem to be an authority against the contention of the defendants; but there it was expressly held that a covenant not to kill game was not a covenant which the assignee of the reversion could take advantage of. The case relied on by the plaintiff, *William v. Earle*, 3 L. R. Q. R. 739, in support of their contention that a covenant not to assign, was a covenant that the assignee of the reversion could take advantage of, is, it is submitted, no authority for the present case. It is distinguishable in several important points. The decision there, was to the effect that a covenant not to assign, ran with the land. The plaintiff, however, was not the assignee of the reversion, he was the original lessor, but the defendant was the assignee of the lessee, so that case is exactly the opposite of the present case, and the action was not in ejectment, but brought to recover

damages for breach of the covenant. There is not the slightest allusion made to the right of the assignee of the reversion to sue for breach of such a covenant. Woodfall, in his work, on landlord and tenant already referred to, lays it down in most express terms that the assignee of the reversion has no such right. In other parts of this work, the author cites the case of *Williams v. Earle*, yet it is a strange fact, that in that portion of his work, which refers to the rights of the assignee of the reversion, he does not cite or say a word about the case of *Williams v. Earle*. It can only be inferred, that he considered it no authority on the question of the rights of the assignee of the reversion. Besides, the case of *Williams v. Earle*, was referred to in the later case of *West v. Dobb*, 4, Q. B. L. R. 634, and in a note to this case, it is stated, that Mr. Justice Blackburn, one of the very judges, who had decided *Williams v. Earle*, protested against the judgment in that case, being taken to have decided more than that the covenant ran with the land and bound the assigns, assigns being mentioned; that fact being expressly pointed out in the judgment of Blackburn, J. This case is, therefore, only an authority to the extent that the lessor can sue an assignee of the lessee for a breach of the covenant not to assign. It is no authority for the converse. Even, admitting, for the sake of argument, that it were, the plaintiff cannot succeed. The assignee of the reversion has no right to sue at common law, for, it was considered to amount to maintenance, *Spencer's Case*, 1 Smith L. C. 51, and the Statute of 32 Henry VIII. c. 34, does not apply to the Straits Settlements. It only applies to leases made in England of lands situate there.

Secondly.—Has there been a breach of the covenant not to assign? It has not been proved that the British Indian Extension Company executed a deed assigning their interest in the lease. To constitute such a breach of the covenant not to assign, so as to enable the lessor to maintain an action for it, the assignment must be by deed. This is required by the Statute of 8 & 9 Vict. c. 106, a Statute which has been held to apply to the Straits.

[*Hackett, J.* I remember the question arose before me, and I held the contrary.] [a]

However, it is for the plaintiff to prove the assignment to the defendants by the British Indian Extension Company, *Cole*, p. 438. There has been no proof of an assignment nor of an underlease, and the only question that can arise, is, has there been a parting with the possession. The plaintiff contends that although, there has been no proof of an assignment, yet, the Court will consider, the defendants are in possession by a legal title, and assume an assignment; and in support of his contention cited, the case of *Doe d. Batten v. Murless*, 6 M. & S. 110, which is a very different case from the present. It was a case of ejectment by the vendee of a term sold under a fi. fa, and it was objected on the part of the defendant, that there was no sufficient evidence to shew, that the term was legally vested in him. It appeared by a recital in one of the conveyances to which the

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[a] See *Mahomed Joonoos v. Saiboo*, ante p. 242.

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defendant was party, that he was the legal personal representative of his brother, who was administrator to the father, [the person to whom the term was granted], and Lord Ellenborough, C. J., in his judgment, very properly, says: "whence it may be presumed, as against him, either that he obtained Letters of Administration *de bonis non* to his father, after the brother's decease, or that he took the term by assignment from his brother." The case *Doe d. Morris v. Williams*, 6 B. & C. 41, is also no authority in the present question. The facts of the two cases differ; in *Doe d. Morris v. Williams*, the defendant ceased to occupy the premises, and his son-in-law, Wellings, became the occupier, and, from that time, neither paid rent. Notice to quit was given to Wellings. It was objected on behalf of the defendant, that he ought to have been served with a notice to quit. Bayley, J., in his judgment says, "In *Doe v. Murless*, it was considered, that, when it is proved that A. is a tenant, and that upon his quitting the premises, B. takes possession, the latter may be presumed to come in as assignee of A. In this case, there was no evidence of payment of rent by Wellings to Williams, or of any other fact tending to rebut that presumption." Here the British Indian Extension Telegraph Company occupied the premises in question, by their clerks and servants, and on their amalgamation with two other companies, and incorporation under the name of the Eastern Extension Australasian and China Telegraph Company, Limited, the premises continued to be occupied by the same persons. There has, therefore, been no change of tenants either in law or in fact. If this action had been brought against the old Company, and notice to quit had been given to the new Company, it would be a sufficient notice to the old Company, as they cannot be permitted to say, at one time, that they are tenants, and at another time that they are not, but as no such question arises here, the case of *Doe v. Williams*, does not apply. The plaintiffs have not attempted to prove an underlease, as in fact, there was none. The only breach of the covenant, therefore, that they can assign is, that there has been a parting with the possession of the premises. The case of *Doe d. Dingley v. Sales*, 1 M. & S. 297, differs from the present in this important particular. It was there held that a person having entered into partnership with another, and having given him the exclusive possession of a certain portion of the premises, and a joint possession with himself of the rest, had committed a breach of a covenant not to assign. Here the defendants, the new Company is made up of the old Company and two others. The old Company is, therefore, a component part of the new Company, the defendants, and has joint possession of the whole of the premises with the two other Companies who go to form the new Company. There has been no giving up of the exclusive possession of any part of the premises to either of the companies with whom the old Company amalgamated. In the case of *Greenlade v. Tapscott*, 1 Cr. M. & Roscoe, 55, it was clear that the defendant had parted with the possession, and having covenanted not to do so, he was held liable. The case goes no further than that. The case of *Holland v. Cole*, 1 H. & C. 67, was

a case under the Bankruptcy Laws, and has no bearing on the present question. The lessee there executed a deed under the 192nd section of the English Bankruptcy Act, 1861, whereby he assigned all his property to trustees, for the benefit of his creditors. In the case of *Doe v. Laming*, 4 Camp. 73, it was held, that taking in a lodger is not a breach of the covenant not to assign. It is a case cited in all the text books, and has never been overruled. It is also referred to in the notes to *Dumpor's case*, 1 Sm. L. C. 43. The case of *Doe d. Ambler v. Woodbridge*, 9 B. & C. 376, has been cited as an authority against this decision. The only question there, was, whether a receipt of rent after knowledge of the breach was a waiver of the forfeiture, and it was held that it was not, as the breach was a continuing one. The forfeiture was incurred by using rooms in a manner prohibited by the lease, and there seems to have been no question upon that point. The covenant was peculiar and particularly stringent, but, it is submitted that, twist the words as one may, it can never be held to be an authority that the taking in of a lodger is a breach of a covenant, not to assign; especially, as there is an authority in point, which has never been overruled, and which must be, therefore, considered as law. The case of *Charnley v. Winstanley*, 5 East 266, was referred to, to shew that marriage would operate as a forfeiture in such a covenant; but this would be in direct opposition to the law as laid down in an old anonymous case reported in Moore's Reports, and cited in the notes to *Dumpor's case*. It is, in fact, no authority on the present question; no inference, even arguing by analogy, can be drawn from it, which bears in the least on the subject in dispute. It was an action in covenant wherein A. declared against B., and her husband, for that B. before her intermarriage covenanted with A. to have certain accounts in difference between them, left to arbitration and to abide and perform the award provided it were made during their lives, and A. protesting that B. had not before her intermarriage performed her part of the covenant averred that, after making the indenture and the intermarriage of the defendants, the arbitrator awarded B. to pay a certain sum, and then alleged a breach for non-payment of such sum. After a verdict for the plaintiff on *non est factum* being pleaded, it was moved in arrest of judgment, that the marriage of B. after entering into the covenant to submit to arbitration and before any award made, was a revocation of the arbitrator's authority, and consequently, there could be no breach of an award which he had no authority to make. It was held that although the plaintiff could not recover upon the breach assigned for non-payment of the sum awarded, because the marriage was a countermand to the authority of the arbitrator, yet, as by the marriage itself, B. had by her own act put it out of her power to perform the award, the covenant to abide the award was broken, and the rule was discharged; Lord Ellenborough, C. J. in his judgment saying that "notwithstanding, the plaintiff had stated his real grievances informally, yet if, upon the whole, it appear that the defendant Frances [B] has committed a breach of covenant, the judgment cannot be arrested, upon the principle as laid down in *Le Bret v. Papillon*,

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HACKETT, J. "4 East 502—that, however, defective the pleadings, and however
 1874. "imperfect the prayer of judgment on either side may be, we are
OH YEAN "bound *ex-officio* to give such a judgment as, upon the whole
HENG "record, the law requires us to do." In *Craven v. Brady*, 4 Ch.
v. Ap. L. R. 296, it was held that marriage operated as a forfeiture,
EASTERN but the facts of that case were peculiar. The wife had altogether
E. A. & C. put it out of her power to comply with the provisions of the will,
TELEGRAPH and the Lord Chancellor [Hatherley] says it would have been no
Co., LD. forfeiture if she had made a settlement. We do not dispute the
 authority of the cases of *Sanders v. Pope*, 12 Vesey 292, and *Hill*
v. Barclay, 18 Vesey, 63, they were both cases in equity, and have
 no application to the present case. The case of *Varley v. Coppard*,
 7 L. R. C. P., is, if anything, in our favour. It is a case the very
 reverse of the present. There the one partner in going out of the
 firm assigned over, all his interest to the other, which was held to
 be a breach, but Mr. Justice Willes specially reserved the point
 whether the taking in of a partner, which is, we submit, the ques-
 tion in the present case, was or was not a breach. This shows that
 he draws some distinction between the cases.

On the whole, as regards this point the old Company being a
 component part of the new one, there has been no parting with
 the possession; there is a joint holding of the premises by the old
 Company, and the others under the name of the new Company, and
 there has been therefore, it is submitted, no breach of the covenant.

As regards the third point the contention of the plaintiff is
 inconsistent with his argument on the first. It is first said the
 defendants must be presumed to be rightfully in possession, and
 secondly, that they are in wrongfully, and on this point the case
 of *Sterling v. Maitland*, 5 Best & Smith, 840, has been cited, but the
 case, in fact, has no application to the present one. In that case
 the United Kingdom Insurance Company dissolve and merged
 itself in the North British Insurance Company, but here the Bri-
 tish Indian Extension Company did not dissolve itself. It is in
 existence at the present time. The three companies, of which the
 new Company has been made up, were all distinct Companies each
 in existence at the time of amalgamation, and on amalgamation
 became the Eastern Extension Australasian and China Telegraph
 Company which, till then, had no existence; whereas, in the case
 was a distinct Company cited the North British Company, in exist-
 ence at the time, the other dissolved. The old Company, the
 British Indian Extension Company, the lessee, thus formed a
 component part of the new Company.

[*Hackett, J.* Does not the new Company form a new body
 altogether ?]

No. It is an analogous case to the taking in of a part-
 ner.

[*Hackett, J.* There is a great difference between a private
 partnership and a Company. Shares in a public Company may be
 bought in the market, whereas in the case of a partnership, no one
 can be a partner without the consent of all the other partners;
 you are, I think, bound to make out that the two companies the
 British Indian Extension, and the Eastern Extension Company,

are the same Company, or that the present case is the same as the taking in of a partner.]

It is the same Company with two other companies added as partners and a change of name. Whether the taking in of a partner merely, would or would not be a breach of the covenant not to assign, has never been decided. Willes, J. refers to such a case, but gives no opinion on it in *Varley v. Coppard*. It is submitted that it would be no breach, and Willes, J. having raised the point, shews that in his opinion, at least, as already stated, there was some distinction between this and the case of an outgoing partner assigning his interest to the continuing partner.

[*Hackett, J.* Suppose the lessor leased the premises to a solvent Company. The question of rent would be important to the landlord, and suppose the directors of the Company make a bargain with an insolvent Company with a different name,—would you contend it would be no forfeiture ?]

No. As the Companies are distinct.

Cases like the present must have arisen in England, yet, why can no direct authority on the point be found ? It is simply because counsel must have been decidedly of opinion that it was no forfeiture, and advised their clients not to bring their actions. In the case of *Doe d. Norfolk v. Hawke*, 2 East 481, the lessees had left the premises altogether and those in, were wrongfully in possession, but here the defendants are not wrongfully in possession as the two Companies amalgamated with the British Indian, with whom the lease was made. This distinction must always be borne in mind also, that companies hold possession by their servants, so that the reason given for this covenant, that the lessor is entitled to have only such person as he chooses to lease to in possession, does not apply to the case of a Company.

The law, as regards the question of waiver, as stated by the plaintiff's counsel is, we admit correct. It is essential that the lessor should have knowledge of the breach at the time he receives the rent, *Goodright v. Davies*, Cowp. 803, 1. Sm. L. C. 36. The plaintiff has said he was not aware of the amalgamation at the time he received the rent, but the defendants acted fairly and openly, and published the fact of the amalgamation in the local papers and the *Government Gazette*. The question then is, is the publishing the notice in the papers, sufficient notice.

[*Hackett, J.* The notice was published in English, and I think it would be very hard to hold such a publication notice to the oriental population of this place.]

It would be constructive notice.

Lastly—Is the action brought in proper form ? It is an action of ejectment, and the plaintiff can only maintain it under the proviso for re-entry. The covenant not to assign is a negative covenant, namely, not to do a certain thing, and it is submitted that the proviso for re-entry, applies only to affirmative covenants. Provisos for re-entry, as they defeat the estate, must be construed strictly. In *Doe d. Spenser v. Goodwin*, 4. M. & S. 265, the proviso was on breach of covenants "hereinafter contained," there were no covenants following the proviso, and it was held that the word

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“hereinafter,” could not be read as “hereinbefore” or rejected, and the defendant had judgment. To the same effect is *Doe d. Abdy v. Stevens*, 3 B. & A. 299. It was there held that a proviso in a lease giving a power of re-entry if the lessee “shall do or cause to be done any act, matter, or thing contrary to and in breach of any of the covenants,” does not apply to a breach of the covenant to repair, the omission to repair not being *an act done* within the meaning of the proviso.

In a late case, *Phillips v. Bridge*, 9 L. R. C. P. 48, the plaintiffs were also held strictly to the wording of the proviso. These cases shew the construction the Court will put on such provisos; they will always construe them strictly. In *West v. Dobb*, 5 L. R. Q. B. Ex. Ch. 46, the words of the covenant and proviso are very similar to those in the present case. It was no doubt left only in the form of a query, whether such a proviso applied to negative as well as to affirmative covenants, but on a perusal of the case, it will be noticed that, although two of the judges [Kelly C. B. & Channell B.] with the caution generally shown by the Bench, preferred to base their decision upon the ground, that there had been no breach of the covenant; yet, they express a strong opinion in favour of the defendants’ contention. If that contention be correct, and arguing by analogy, it is submitted that it is, then, the covenant alleged to be broken, being a negative one, does not come within the operation of the proviso for re-entry, and the plaintiff cannot maintain ejectment, but only an action for damages, should the Court be of opinion, that there has been a breach of the covenant not to assign. It is submitted, therefore, that on all the questions raised, there should be judgment for the defendant.

Bond in reply.—As to the right to sue and the proper mode of suing, *William v. Earle* having decided that a covenant not to assign, runs with the land, the only question is, does the Statute Henry VIII. c. 34, apply to the Straits Settlements. There is every reason that it should, and none, that it should not. Being an enabling Statute, it applies here just as the Statute 3 & 4 Anne, c. 9 which makes promissory notes negotiable, and as to the application of which here, no doubt, has ever been raised.

That the Court will presume that the defendants are in possession as assignees of the lessees, in addition to the cases already cited, the case of *Doe d. Hemmings v. Durnford*, 2 Cr. & J. 667, is a very strong authority. This was an ejectment for a forfeiture under a covenant to repair, and it was argued for the defendant that no sufficient evidence of privity of estate was given to render the defendant liable under the covenant of the lease as assignee. Bayley B., however, in his judgment said :—

“I consider that there was sufficient to shew a privity between the defendant and the lessor, and that the defendant was in *under the lease*. The lease was produced, and was at once admitted by the defendant’s counsel. The lease came out of the custody of the lessor of the plaintiff, and was executed by the original tenant, and the admission by the defendant shews that he was cognizant of it. The defendant was in possession of the premises, and it turns out that he was in the habit of paying the

"rent reserved by the lease. I am of opinion that there were "circumstances which made out a *prima facie* case of privity." On the point at issue, this case is almost entirely on all fours with the present. With respect to what is a breach of covenant not to assign, the defendants rely on the case of *Doe v. Laming*, 4 Camp 73, where Lord Ellenborough held that taking in a lodger was no breach—and they state that that case has never been overruled. It is true, that it has never been directly overruled, but very strong doubts were cast upon it by the full Court in the case of *Greenlade v. Tapscott* already cited, and the decision cannot now be looked on, as a guiding precedent. We admit the contention of the defendants that provisos for re-entry are generally construed strictly, and we admit also the correctness of the law in the cases cited by the learned Counsel. It is sufficient to say that they are not at all analogous to the present case. As to the *obiter dicta* of Kelly, C. B. & Channel, B. in *West v. Dobb*, these learned judges seem to have indulged in an excess of astuteness, and with all respect to them, it is submitted, that their suggestion is contrary, not only to common sense but to every principle of law,—and that the distinction attempted to be drawn by them between positive and negative covenants, is purely imaginary. The real question in the present case is this—Is the defendant Company the same as the British Indian Extension Telegraph Company, the original lessee? Now the course of proceeding when Companies amalgamate, is this—the Amalgamating Companies dissolve themselves, and are wound up—and out of their ashes, is formed a new Company altogether. So far as the British Indian Company is concerned, this course has been adopted—for one of the facts agreed upon is its dissolution, and there can be no doubt that the other two companies are also defunct. We find then an entirely new Company in possession of our premises—and we must take it that they are in, either as assignees of the British Indian Company, or that the latter has abandoned the premises, and that the Eastern Company finding them vacant, has quietly taken possession of them. In the first of these alternatives, there has been a clear breach of covenant according to the authorities cited; in the second, there has been as clearly an illegal and unwarranted trespass committed by the defendants.

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April 2. *Hackett, J.* This is an action of ejectment brought by the assignee of the reversion to recover possession of certain premises leased by Mr. Bishop to the British Indian Extension Telegraph Co., "Limited." The lease contains a covenant on the part of the lessees not to assign, under-let, or part with the possession of the premises, or any part thereof without the consent of the lessor—and the main questions left for my decision, are, whether there has been a breach of this covenant by the amalgamation of the original lessees' Company, with the present defendant Company, if so, whether the plaintiff has the legal right to sue, and if I should hold, that there has been a forfeiture, whether there has been a waiver of

HACKETT, J. such forfeiture. On the last point, I am clear, that there has been no waiver; an advertisement of the amalgamation was no doubt, published in the *Pinang Gazette*; but it would be going too far to hold this notice to a Chinese gentleman unable to read English. But, further, the defendant has distinctly sworn that he was unaware of the amalgamation, till the receipt of Gott's letter in February, and the receipts for rent, until that time were made out in the name of the original lessee Company. Mr. Gott, has also acknowledged that he gave no notice of the amalgamation to the plaintiff, and since February, no rent has been received by the plaintiff.

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There being no waiver of the forfeiture, has the plaintiff as assignee of the reversion, the legal right to bring this action? This greatly depends on whether the covenant not to assign without licence, runs with the land or not. Both Cole and Woodfall, state that the assignee of the lessor, has no right to sue for such a breach of covenant; and, cite *Pennant's case* to shew that the covenant is merely collateral. I have read *Pennant's case*; and I do not think, it warrants the conclusion arrived at by the learned authors; and I must confess, that I have been unable to discover any direct authority upon which they have based their opinion. One of the authorities cited in support of their contention, is *Lucas v. How*; but no decision was given in that case. The case of *Williams v. Earle*, however, seems to support the contention of the plaintiff, it having been held there, that a covenant not to assign without licence, touches the thing demised, and is therefore, a covenant running with the land.

Mr. Ross has argued that the Statute 32, Henry VIII., c. 34, which gives the same rights to the assignees of the reversion, as the lessor has, does not apply to the Straits; but as it is an enabling Statute, I am of opinion, that it does. I think, therefore, on the strength of *Williams v. Earle*, taken together with the Statute of Henry VIII., that the plaintiff has a right to bring this action.

Has there then been a breach of covenant on the part of the original lessee Company?

This would seem to be a case *primæ impressiones* as neither of the learned counsel, who have argued this case very ably, has been able to cite any case exactly in point. The nearest approach to it, is the case of *Varley v. Coppard*; but even then, Willes, J., left the point undecided, whether the taking in of a partner, would be a breach of the covenant. Here, three companies, the British Indian, China Submarine, and British Australian, carrying on business in the same building, I believe, in London, but with different Boards of Directors; and I presume, each with a different deed of settlement, amalgamate. I wish I had before me the deed executed on amalgamation; but as it has not been produced, I must take the case as it stands. The lease was made to only one [the British Indian] of the three amalgamating companies. A case has been cited by Mr. Bond, which although not quite analogous, throws considerable light on the position of the companies on amalgamation. That is, the case of *Sterling v. Mailland*. Two

other cases. *Tasker v. Shepherd* [30 L. J., Ex. 207], and *McIntyre v. Belcher*, [32 L. J., C. P. 254], also shew how the law regards covenants, entered into by companies and partnerships. In the present case, a fact to my mind of great importance is admitted, viz., that the British Indian Company, the original lessee Company, has been dissolved, and though it does not appear on the record or in evidence, that the other two companies have also been dissolved, still it is a natural presumption, that for the purposes of this amalgamation, they have also dissolved themselves. Now, the defendants to successfully withstand this action, must shew that the defendants are the same Company as the original lessee Company. Mr. Ross has contended they are, but I cannot agree with him. The fact of the dissolution of the British Indian Company, seems to me, to be quite irreconcilable with such a contention, and when we find that three amalgamated Companies take its place with a new and different board of directors, a new and enlarged body of shareholders, and a new and distinct object in view from that of the British Indian Company, it seems to me, I must say, a contradiction in terms to assert that the new Company is the same as the old one. It is in point of fact an entirely distinct Company.

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The new Company is therefore in possession either with the consent of the original lessee Company, in which case there would be a direct breach of the covenant or they are in, without such consent, in which case they are trespassers.

On these grounds there must be judgment for the plaintiffs.

ATTORNEY-GENERAL v. THIRPOOREE SOONDEREE.

A gift to a person for the benefit of a temple is a good charitable gift and one the Court will carry out.

A gift of money to an idol for the benefit of a temple is void as being an absurdity and not a charity.

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July 23.

This was an information by the Attorney-General to establish a charity and payment of certain legacies to charitable purposes. The subject matters of the suit were [1] as regards certain lands conveyed to Jogmohon Tacoor, deceased, for the benefit of the Hindoo Temple, and [2] the sum of \$200 bequeathed by the said Jogmohon Tacoor by his Will to an idol in the temple named "Sree Dhar." The defendant was the administratrix of the said deceased.

Van Someren for defendant. The grants and the bequest do not constitute a charity, and if not a charity, the gifts are void. A gift to a temple is not a charity and is void. *Lewin on Trusts*, p. 85, Sir W. Grant in *Morice v. Bishop of Durham*, 10 Ves. 536, explains what charity is, and the Statute 43 Eliz. c. 4, defines what are charities, also, *Tudor on Charitable Trusts*, 2nd ed., pp. 4-12 [Ed. 1862]. In *Thornton v. Wilson*, 34 L. J. [N. S.] ch. 667, V. C. Kindersley said: These are not gifts to the ministers personally but to ministers for the time being. He does not say however

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it is not a charity, but the inference is, it must be, or the Mortmain Act would not apply. The cases of *Choa Choon Neoh v. Spottiswoode* [a] and *Advocate-General v. Dum Moker, &c.*, Perry's Oriental Cases, p. 526, are strong authorities to shew this is not a charity as it is not for the benefit of the community. The gift of \$200 to the idol "Sree Dhar" by which is to be purchased a paddy field for the benefit of the said temple is also void. If the gift is to the idol, gift is to nothing which is an absurdity; and tends to a perpetuity—but if to the idol in trust for the temple, it is equally absurd, as it can't be a trustee.

Bond for plaintiff. This is a valid charity. The construction of the grants is, that the gift is to the priest and his successors for the benefit of the temple. *Thornton v. Wilson* is an authority that this is a charity, or the gift could not have been held void under the Statute of Mortmain. The thing is to find out if the grantor's object was charitable, and if so, and the charity is sufficiently definite, the Court will uphold it, as the Statute against superstitious uses does not apply here. *Miller v. Farmer*, 1 Merivale 55; *Attorney-General v. Bishop of Chester*, 1 Brown 441. The Court will direct a proper conveyance to be made to the persons it nominates as trustees. *Attorney-General v. Tunnard*, 1 Ambler 353. *Story's Equity Jurisprudence*, §§. 1151-1152. The gift of \$200 to the idol is also charitable. Some allowance must be made for the ignorance of natives who are not able to express themselves clearly—this is a mere ignorant way of expressing a gift to a person in trust for the temple. The idol moreover was an object in the temple, and, according, to *Hoare v. Osborn*, 1 L. R. Eq. 585, is good.

Ford, J., held the grants for the benefit of the temple to be good charitable gifts, and made an order for appointment of new trustees and the usual decree in such cases. The gift to the temple he held invalid as being an absurdity and not a charity.

VERAPAH CHETTY v. LIM SWEE CHOE & ANOR.

PENANG.
—
FORD, J.
1874.
—
August 4.

The plaintiff having, according to the usual Chettys' Insurance, undertaken the Insurance of the defendants' Brig "Woodbine" for certain voyages within a given period, afterwards in consideration of an extra rate of premium for three months, paid him by the defendants, granted the defendants license to deviate from the voyage originally insured against. The license to deviate was in writing, but beyond mentioning that the voyage was to be a single voyage to the particular port and back, and that three months' extra premium had been received, made no further mention of time. It stated that the "risk" was to be the same as that mentioned in the original policy. The vessel sailed to Rangoon, and on her way back was lost, by perils insured against; but at the time she was lost, the three months for which extra premium had been paid had expired, but the original time mentioned in the policy was still unexpired. The defendants had not paid extra premium for the period between the termination of the three months and the loss of the vessel.

Held, the license did not limit the voyage to three months—that "risk," included the original time, and the vessel being lost within the original period, by perils insured against, the same was covered by the Policy.

This was an action on a Policy of Assurance dated 8th January 1874, on the Brig "Woodbine." The document sued on was an

ordinary printed Chettys' Insurance, the blanks in which were filled up in writing. The Policy was for four voyages from Penang to Moulmein and back, with liberty on any two of such voyages to call at Singapore. The time limited by the Policy was ten months from its date—the premium being close on 18 per cent. In April following, the defendants being desirous that the vessel should proceed to Rangoon instead, in consideration of their paying the plaintiff three months' premium on the sum insured, at the rate of 36 per cent. *per annum*, obtained from the plaintiff a Tamil paper to the following effect:—

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"In the year 1874, on the 4th day of April, this receipt is written and given unto Kam Choo Poh, a Chinaman, and Lim Chee Choo, a rice shop-keeper, to wit:—"

"That on the 8th day of January, of the current year, a Bond in my favor was granted by both of you, relative to the Insurance of a British vessel called the "Woodbine," the conditions of which express not the said vessel is allowed to proceed to Rangoon and back, and whereas for the purpose of her now proceeding to the said port, I have received from you three months' interest at the rate of three per cent. per hundred per mensem, viz., \$18, as extra premium not referred to in the Bond, and which said sum of dollars eighteen, I acknowledge to have received from you, and that the said vessel may have one trip either to proceed to Rangoon or Singapore and return to this place, and that the risk declared in the said Bond shall be borne by me."

(Signed) VERAPAH CHETTY

[in Tamil Characters.]

In pursuance of this license to deviate, the "Woodbine" in that same month of April, sailed for Rangoon; and thereafter left Rangoon on her return voyage to Penang, when she was lost by perils insured against. At the time of her loss, however, she had exceeded three months from the date of the license, though it was still within the ten months mentioned in the original Policy. The defendants refused to pay, maintaining such vessel was covered by the Policy.

Clarke [*van Someren* with him] for plaintiff, contended that the license was intended to cover only one voyage, which was to be completed within the three months, and the ten months mentioned in the Policy had nothing to do with the voyage to Rangoon—three months to Rangoon and back was the ordinary time.

Ross, for defendants, contended that as the license was granted four months after the original Policy, it could not be confined to three months. The license was not limited by time but by voyage only, and the plaintiff had by receiving an extra rate of premium, received full consideration for the license. That the "risk" mentioned in the license, meant the ten months as well.

Clarke, in reply contended that if it was not intended to confine the voyage to three months, there would have been no mention of three months' premium, which certainly was inserted. The words relating to three months would have no meaning if defendants' construction was correct. Every word on the license should

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be construed and given full effect. "Risk" in the license meant simply the kind of perils insured against. No extra premium was paid after the three months.

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August 9th. *Ford, J.*, held that the voyage to Rangoon was not limited, by the license, to three months; and "risk" in the license included the ten months time—that the vessel being lost by perils insured against, within ten months, the loss was covered by the Policy, and gave judgment for the defendants.

The plaintiff having obtained leave to appeal against this decision to the Full Court of Appeal, such appeal came on this day [15th June, 1876] to be heard before Sidgreaves, C. J., and Phillippo, J. sitting by consent of Counsel on both sides, as a Full Court of Appeal.

Clarke [*van Someren* with him] for appellant reiterated their former argument.

Ross, for respondents, *contra*.

The judgment of the Court was delivered by

Sidgreaves, C. J.,—the Court holding that whatever was the intention of the parties, the Court was bound only to regard the language they had used; that the license was not either in terms or by implication limited to three months, and the "risk" mentioned therein, included the original ten months. The judgment of the Court below was therefore correct and must be affirmed.

Judgment Affirmed. Appeal dismissed with costs.

LIM SIM KAY v. FRASER & Co.

PENANG.

FORD, J.
1874.

November 3.

Defendants contracted to sell plaintiff a certain number of Pillar or Carolus dollars and the contract was reduced to writing, and was as follows:—"Sold to Lim Sim Kay 12,000 Carolus, 110 per cent. if sent by bank, at the earliest steamer's arrival. Chopped dollars not to be included. Signed p.p. Fraser and Co., A. M. Watson." The defendants then, with plaintiff's knowledge and consent, despatched a telegram to the bank in question as follows: "Carolus dollars agreed 10 per cent., 12,000, if without chop, ship per first steamer." The bank replied same day by telegraph, cannot now sell Carolus under twelve. No picking or refusing allowed. Price here twelve, firm. Reply."

Held, the sending by the bank of the dollars was a condition precedent to the defendants' liability to the plaintiff: that the reply of the bank refusing to allow "picking or refusing" was a refusal to send the dollars asked for: and the condition precedent had not been fulfilled.

Held also, that the sending thereafter by the bank to the defendants of same amount of Carolus dollars, partly chopped and partly unchopped for a third party, was also not a fulfilment of the condition precedent.

The facts of this case sufficiently appear from the judgment.

Thomas, for plaintiff.

Ross, for defendants.

Ford, J. This case is one of a numerous class, which, from the imperfect language in which members of the mercantile community often express their more hurried contracts, cause considerable difficulty to the Courts who have to put a satisfactory construction upon them.

The action is brought by one Lim Sim Kay against Messrs. **FORD, J.**
Fraser & Co., to recover the sum of \$600, the alleged loss incurred **1874.**
 by him from a breach by the defendants of an agreement which **LIM SIM KAY**
 is in the following terms :— **v.**
FRASER & Co.

“Sold to Lim Sim Kay, 12,000 Carolus 110 per cent, if sent by bank at
 “the earliest steamers arrival. Chopped dollars not to be included.

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p.p. FRASER & Co.

A. M. WATSON.”

To a declaration for the breach of this agreement, averring the performance of the condition precedent that the bank should send the dollars, the defendants have pleaded four pleas; the first, traversing the agreement; the second, averring in substance that the defendants were agents only, and had disclosed their principals, the bank; the third, denying the fulfilment of the condition precedent, the sending of the dollars by the bank; and a fourth, denying that the said dollars were sent to the defendants for plaintiff, but were sent by the bank in pursuance of a contract made by the defendants with another person. The second of these pleas was struck out upon demurrer, no agency appearing on the face of the agreement, and the Court holding, that, except by means of an equitable plea, such as was allowed in *Wake v. Harrop*, 6 H. & N. 768, this defence could not be raised; the fourth plea was also disallowed as not raising any legal defence to the action. The Court, at a subsequent stage of the proceedings allowed a further plea to be added by the defendant, alleging that at the time of making the agreement in question, a further, but repugnant parol term had been agreed to between the parties, *viz.*, that the agreement was subject to the acceptance by the bank of the terms of an offer by the defendants. The Chartered Bank of India, China and Australia, carrying on business at Singapore, was shewn to be the bank referred to in the agreement.

I may at once clear the case of the many difficulties, with which this added plea of a further parol term, seemed fair to surround it, by saying that, on a careful consideration of the evidence, I think it of too conflicting a character to justify the conclusion, that such a term was clearly understood and agreed upon by both parties. I have little, if any doubt, from the evidence which has been given, that the defendants intended such to be a term of the agreement: but that, this was sufficiently and clearly explained to and accepted by the plaintiff, does not seem to me established. Looking at the fact of the denial by the plaintiff and his agent of such a term, and that there were no further witnesses to the conversations, and that these were carried on in a language foreign to both negotiators, I think it most probable, that no very definite arrangement was come to on this point. Rejecting, therefore, the case of the defendants under this head also, the Court has now to consider what were the liabilities of the defendants, on the face of

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the contract itself; and whether they have discharged them. To aid the Court in arriving at a sound construction of this imperfectly worded document, it becomes necessary to look, at the facts attending the making of it—to obtain such light as it may, from the surrounding circumstances, without permitting them to vary its terms. If the Court should hold that the defendants were, under the events which happened, bound to deliver these dollars, it is not disputed that they are liable for the breach of their agreement. The facts of the case, excluding the tendered evidence of agency as inadmissible, and the introduction of the verbal term, as not sufficiently established, may be taken to be shortly as follows.

The defendants act generally in Penang as the Agents of the Chartered Bank of India, China and Australia, and either in that capacity, or upon some other arrangements between them as to the sharing of the profits of such transactions, are in the habit of procuring from the bank dollars—known in the market as Pillar or Carolus dollars—for sale at a profit in Penang. The cause of this trade is a special demand for such dollars in Acheen. So early as the 2nd of July, the Bank had sent up a general permission to the defendants to sell 12,000 Carolus dollars at 10 per cent. premium, but no sale seems to have been made in pursuance thereof, and it was not until the 6th of the month, that the plaintiff saw the defendants [or rather the manager, Mr. Watson, who conducts the business, and who acted for them throughout,] on the subject of purchasing Carolus dollars. The evidence given, clearly established, that at this lapse of time from the date of this commission, the defendants could not have acted upon it without a further reference to the bank. This point indeed, was not contested seriously by the plaintiff, and, indeed, has not much practical bearing upon the matter, as the terms of the contract subsequently entered into, embodying the condition precedent “if sent by the “bank,” shew, in the opinion of the Court, that a reference of some kind was necessarily contemplated by the parties.

On the morning of the 6th of July, between 10 and 11 a.m., the plaintiff and his agent, Lim Key Hee, had one or more interviews with the defendants, and although very different accounts are given of what then took place, with reference to the alleged disclosure of agency, and the introduction of a further term to the contract, yet, upon that which remains after deducting these subjects, there is substantial accord upon all points, but one—immediately to be referred to. An agreement was come to, and the defendants sent a telegram in the presence of the plaintiff and his agent, to the bank at Singapore. This telegram was read over to the plaintiff, and notwithstanding the strong effort that was made by him and his agent, to establish that it was incorrectly translated to them by Mr. Watson, I am of opinion, it was properly translated to him. This telegram was sent at 11-5 a. m., and is in the following terms “Carolus dollars agreed 10 per cent. “12,000, *if without chops*, ship per first steamer.” Immediately after the sending of this telegram, the plaintiff leaves the defendants’ premises, but before any reply comes from the bank, sends

his agent, Lim Key Hee, to insist upon the contract verbally made, being reduced into writing. This is done in that form of contract, upon which this action is now brought, and the document handed to the plaintiff. At 3-25 p.m., the bank at Singapore telegraphs to the defendants "Cannot now sell Carolus under twelve. No picking or refusing allowed. Price here, twelve, firm. Reply."

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This telegram, the defendants shewed the agent, Lim Key Hee, who, however, insisted that the defendants' contract was a binding one, and refused to pay a higher premium, or forego his rights under it. The defendants disclaimed liability, and then sold 12,000 Carolus dollars to one Wee Tet Pack, upon the terms contained in the bank's last telegram, and this contract was carried out, notwithstanding the receipt by the defendants of a later telegram from the bank at 4-45 p.m., cancelling their order to sell at 12 per cent., prices having further advanced at Singapore. The bank sent up by steamer, and as I must hold on the evidence by earliest steamer, within the meaning of the terms of the Contract with the plaintiff, 12,000 Carolus dollars *Mixed*—partly chopped, and partly unchopped. They were consigned to the plaintiff, the bank having no knowledge of the purchaser, and were duly handed over, on arrival, by the defendants, to Wee Tet Pack. The plaintiff demanded them but unsuccessfully.

Upon these facts, and in addition to the several points before referred to, the defendants contended that they were not liable upon their contract on the grounds: [1]—that the contract was an entire one and for unchopped dollars only, and the dollars sent being mixed, they were not the plaintiff's; [2]—that earliest steamer meant first steamer, and the steamer that brought these dollars was not the first steamer; [3]—That the terms "if sent by bank" in mercantile usage, always imply the condition "at the option of the sender." I have already stated my opinion to be that, the evidence does not support the defendants' second contention, it being clear, I think, that, the *Medina*—the vessel which brought these dollars—might fairly have been the earliest practicable steamer for sending them; and I am also of opinion that such a term as "chopped dollars not to be included," does not imply that entirely in the subject matter of a purchase, which would preclude a purchaser from breaking the bulk of his consignment, and excluding from it, such portion as, might not comply with the terms of his order. If the bank had sent up these dollars or any other number of Carolus dollars in response to the defendants' telegram, dated at 5 minutes after 11, I am clearly of opinion the plaintiff might have picked therefrom only such as were unchopped. The only evidence to sustain the third line of defence, was that of Mr. Allan, of the firm of Sandilands, Buttery & Co., and, as his view of mercantile usage in this particular, was questioned by Mr. Francis Mackie, of Messrs. Boustead & Co., the Court cannot hold such a custom of interpretation even approximately established. The defendants, are, therefore thrown back upon their third plea for their real defence of this action. Was or was not the condition precedent upon which this contract

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hangs, fulfilled? Did the bank send up the dollars, the *subject matter of the contract of sale*? Now, in considering this question, it is manifest that the bank had to send some parcel of Carolus dollars, and necessarily some parcel concerning which some previous communication must have been made by the defendants. The words of this contract could not embrace every parcel of Carolus dollars, which the bank might be pleased to ship to Penang by first steamer. Dollars sent in pursuance of an order to the bank from another person; dollars consigned to the defendants for other purchasers and over which the defendants had no control; or dollars consigned to the defendants for other persons of whose purchases from the bank they had no previous notice. Such dollars, although clearly "sent by bank," would still by obvious reasoning not be the subject of the contract between this plaintiff, and the defendants. It is, therefore, absolutely necessary from the words of this condition precedent, to imply that some communication was to pass between the defendants and the bank, something to fix the exact subject matter of the contract, the sending or non-sending of which was to render binding or otherwise the contract of sale itself. Now the only communication we find to have been made between the defendants and the bank, upon the subject of the plaintiff's contract—a communication, it will also be remembered, made in the presence of, and submitted to the plaintiff—was the telegram sent at 11-5 a.m. This was in these terms "Carolus dollars agreed 10 per cent, *if without chops* "ship per first steamer." This telegram seems to the Court, of the utmost importance, as identifying the character of the parcel which the bank was to send; and the bank's reply and subsequent action of equal importance in determining whether the condition precedent was fulfilled by them or not. If the bank had sent Carolus dollars in reply to this telegram, whether mixed or otherwise and whether at a higher or lesser rate of premium, the Court would have held the defendants bound under the terms of their contract to have handed over all unchopped dollars to the plaintiff, that is to the number of 12,000.

Neither the defendants nor the bank, indeed, had a right to impose a term upon the plaintiff, which was not within the four corners of his written agreement, and, so far as the answer to this telegram contains an imposition of a higher rate of premium, or any other term inconsistent with the contract with the plaintiff, its effect can be nothing. But the telegram of the bank contains something more. It deals with something, which is within the four corners of the agreement, *viz.*, the *sending* of the dollars. To some extent, and irrespective of any question of a mercantile usage of certain terms—which usage, I have held, not to have been proved—some option is left to the bank. This is a necessary implication from the language used. The defendants might not escape liability, because the bank refused to comply with every term of their proposal or offer, but if the bank refuse to comply with that which asks them to send the particular parcel of dollars required, How can the defendants be held responsible? Now the telegram of the defendants' of 11-5 a.m., sufficiently identifies

the character of the Carolus dollars the bank was to send, and they had contracted to sell. These were to be unchopped. "If without chops" is the description of the telegram and, read with the language of the contract itself "chopped dollars not to be included," this shews, in my opinion, with sufficient clearness, that it was a parcel from of 12,000 unchopped dollars or a parcel, from which the plaintiffs might pick their 12,000 unchopped dollars, which the bank was to send. Now what was the reply of the bank to this? It was in these words: "Cannot now sell Carolus dollars under twelve *no picking or refusing allowed*." What is this but a refusal to send the dollars, the subject of the defendants' mandate and of this contract? I am unable to read this telegram in any other light. Such a communication as that of the telegram of 11-5 a.m., was imperative upon the defendants from the terms of the condition precedent itself. The bank in reply refuse to obey the mandate, and, I am of opinion, therefore, that this condition precedent was not fulfilled, and the defendants are thus protected from the liability, otherwise imposed upon them, and become entitled to judgment upon their third plea. As this litigation, has, however, been brought about, by the imperfect and inaccurate character of the language the defendants have used—an inaccuracy in which the plaintiff, from his being a foreigner and ignorant of the English language, cannot be said to have been a participator—the Court will, in this instance, exercise its discretion as to costs, and directs that the judgment be for them without costs.

FORD, J.
1874.
LIM SIM KAY
v.
FRASER & Co.

SHAIK MADAR v. JAHARRAH.

The Court has no jurisdiction, on its civil side, to entertain a suit for restitution of conjugal rights by Mahomedans.

PENANG.
FORD, J.
March 5.

This was a suit on the civil side of the Court, by a husband against his wife, for restitution of conjugal rights. The defendant pleaded to the jurisdiction.

The plaintiff appeared in person.

Van Someren, for defendant. The Court has no jurisdiction. The Ecclesiastical side can only be resorted to in cases of Christian marriages. The civil, or plea side, does not recognize a suit for restitution of conjugal rights. The Supreme Court Ordinance V. of 1873, section 44, gives matrimonial jurisdiction, but it is the jurisdiction under the charter of 1855, and is exactly the same as section 23 of the old Court's Ordinance V. of 1868, which has been held to confer no jurisdiction. *Lim Chye Peow v. Wee Boon Tek*. [a]

Ford, J., held, the case was concluded by the authority cited, and allowed the plea—dismissing the action, but without costs.

[a] *Vide supra* p. 236.

JEMALAH v. MAHOMED ALI AND ORS.

PENANG.

FORD, J.
1875.

April 30.

The Statute 3 & 4, Wm. IV., Cap. 27, is law in this Colony.

In cases of immoveable property, or any interest therein in the nature of chattels real, the limitation imposed by section 1, clause 12, of the Act XIV. of 1859, runs against the administrator of a deceased person, from the date of the death of the intestate, as if there was no interval of time between his death, and the grant of Letters of Administration.

Action of ejectment. The facts sufficiently appear in the judgment.

Duke, for plaintiff cited *Cary v. Stephenson*, 2 Salk. 421; *Murray v. East India Company*, 5 B. & Ald. 204; *Curlews v. Earl of Mornington*, 37 L. J. Q. B. N. S. 439; *Sturgis v. Daroll*, 6 H. & N. 120; and *Burdick v. Garrick*, 5 L. R. ch. App. 233.

Ross, for defendants, cited Act XX. of 1837 and 3 & 4 Wm. IV. Cap. 27, sec. 6.

Cur. Adv. Vult.

June 30. *Ford, J.* This is an action of ejectment, brought by the administratrix of one Nayen, for the recovery of certain lands now in the possession of the defendants, and which, upon the view taken by the Court, of the character of certain alleged payments of money by the defendants to the plaintiff, have been adversely in their possession from the date of the death of intestate Nayen, who died in the year 1852. The plaintiff, who is the wife of the deceased, did not take out letters of administration to his estate until the year 1873, a period of 21 years.

The property, in respect of which the action is brought, is freehold in its nature, but under the Indian Act XX. of 1837 is, as far as regards its transmission on the death of the person beneficially entitled, to be taken to be of the nature of chattels real. The defendants raise the objection that the Indian Limitation Act XIV. of 1859 runs against the administrator from the death of the intestate, that being the time the cause of action arose, and, if this is so, it is clear that 12 years—the period required by section 12 of the Act from that event—having expired, the plaintiff has no cause of action. The question is one of considerable importance, it being obvious, that if the contention of the defendant is erroneous, the Statute is a mere nullity as against the owners of land or immoveable property taking by descent, there being no hindrance to any of the next of kin, taking out at any time letters of administration, either, original or *de bonis non*, and defeating any title acquired by adverse possession.

The cases cited by the plaintiff for this contention, are cases decided in the English Courts and have without exception, reference to pure personal estate only—a class of property which, from its character, is rarely likely to find its way into the hands of another, except under the character of a trust, and in which case the Statute does not run. The cases are not of a very conclusive character, perhaps the strongest of them, being that of *Burdick v. Garrick*, in which, although the case was determined upon the principle of the person pleading the Statute, being in a fiduciary

relation to the deceased. Lord Chancellor Hatherly treated the point as a settled one. The question raised here, could not be raised in England, real estate at once devolving on the heir at the death of his intestate, and a special clause in the Limitation Act of 3 & 4 Wm. IV., c. 27, s. 6; providing, in cases of impure personalty such as chattels real, that "an administrator claiming the estate or interest of the deceased person, of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the Letters of Administration."

The Court has to consider what the law in this matter is here, where all interests in land or immoveable property, are of the nature of chattels real, for purposes of devolution, there being no similar clause to section 6 of the English Act, in Act XIV. of 1853, which simply enacts that the period of limitation "to suits for the recovery of immoveable property or of any interest in immoveable property, to which no other provision of the Act applies, shall be the period of 12 years from the time the cause of action arose." I should have had no hesitation, but for the authority of the English cases cited, in holding that, even in cases of pure personal estate, the cause of action arose, not at the time where a beneficiary actually took out Letters of Administration, but from the time in which he was in a position to do so. These cases, however, have no application to chattels real, the date of the administrator's title to which, as has been pointed out, is specially provided for, and, in the absence of local authority, I should, upon both the grounds of inconvenience and reason, follow the English law, in respect of this class of cases. But there is a further equally satisfactory ground upon which the decision of the Court in this case rests, namely, that in its opinion s. 6 of the Act of the 3 and 4 Wm. IV., c. 27, is still law in these Settlements. Sir Benson Maxwell, one of the ablest and most painstaking judges that have sat in this Court, many years ago, decided in the case of *Regina v. Willans*, [a] that the English law [subject to certain modifications carefully generalized in that judgment] was introduced into these Settlements by the Court Charter of 1826; and, I am of opinion, that not only was that so, but that the effect of that Charter and of the rules of law regulating the rights of settlers in an unoccupied country, was to carry here the benefit of all English laws subsequently enacted, up to the date, at least, of the creation of a special legislative body having legislative authority in these Settlements. There may, indeed, be a question, as pointed out by Sir Benson Maxwell in the judgment alluded to, whether the Charter of 1855 did not carry with it the law of England, modified, indeed, by subsequent Indian legislation, up to this latter date. But that question there is no need to determine, for, by a reference to the authorities, I find that the Legislative Council of India was established by an act later than the 3 and 4 Wm. IV., c. 27, viz., that of the 3 and 4 Wm. IV., c. 85, and no laws were made under it until April of the ensuing year [1834]. I am of opinion, therefore, that the 6th sec-

FORD, J.
1875.

JEMALAH
v.

MAHOMED
ALI & ORS.

[a] See *Magistrates' Appeals*, Vol. III. of these Reports.

FORD, J.
1875.
JEMALAH
v.
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ALI & ORS.

tion of the English Statute being unrepealed, either directly or by irresistible inference from subsequent legislation, is still in force in these Settlements, and that, in the case of immoveable property, or any interest therein, in the nature of chattel real, the limitation to suits imposed by section 12 of Act XIV. of 1859, runs as if there had been "no interval of time between the death of a deceased "person and the grant of Letters of Administration" in other words, runs against the administrator from the date of the death of the intestate. There will be, therefore, a verdict for the defendants in this case. [a]

LEE AH YIM v. CHEO AH MO & ORS.

SINGAPORE.
—
SIDGREAVES,
C. J.
1876.
January 8.

A sale of property during a *lis pendens* is void altogether; but if the property was, prior to the *lis pendens*, subject to a charge or mortgage, such charge or mortgage is not affected by the *lis pendens*.

If the purchaser of such property during the *lis pendens*, redeems the charge or mortgage as part of the means by which he pays his purchase money, he will,—[although he may have taken a conveyance direct from the party engaged in the *lis pendens*, which conveyance makes no reference to the redemption of the charge or mortgage—and, although he takes no assignment of the charge or mortgage from the original party holding the same]—be entitled to a lien over the property, the subject of the *lis pendens*, up to the extent he redeemed the prior charge or mortgage.

The plaintiff had commenced an action against the defendant, Cheo Ah Moh, relative to certain lands at Campong Glam; while the suit was pending, the defendant sold the land to one Syed Massim. Before the commencement of the action, however, the defendant had mortgaged the land to one Kurpen Chetty, and at the time of the aforesaid sale to Syed Massim, the land was under mortgage to the said Kurpen Chetty. Syed Massim, on purchasing the said land, paid off Kurpen Chetty his mortgage, and then, on paying the balance, [a very small amount] to the defendant, obtained from the defendant direct, a conveyance of the land to himself [Massim]. There was no assignment of the Chetty's mortgage by him to Massim, but the same was considered as satisfied, and cancelled. The plaintiff, on getting judgment in the said action, commenced this suit to set aside the sale to Syed Massim as having been affected by the *lis pendens*, and obtained a decree declaring the said sale bad. On a subsequent day, the attention of the Court being called to the point, the Court amended this decree, by declaring that Syed Massim had a lien over the property sold for the purchase money advanced by him. On the application of the plaintiff, a re-hearing was granted as touching the subject of this amendment by the Court, and the question whether, under the circumstances, Massim really had such a lien or not, was now argued.

J. D. Vaughan, for plaintiff.

Donaldson, for defendants.

Cur Adv. Vult.

[a] It has been held in India on appeal, that there is no resemblance between our Limitation Act XIV. of 1859, and the 3 & 4 Wm. IV., c. 27, and that the latter Statute did not apply to India. See *Radabhai v. Shama*, 4 Bombay H. Court Rep., Appeal cases, p. 155.

Judgment was now delivered by

Sidgreaves, C. J. The question involved in the re-hearing of this case was, whether the Court had acted rightly in varying the original decree, by declaring that Syed Massim, the purchaser of the Campong Malacca property, had a lien upon that property for the amount of the purchase money paid by him, enabling Ah Moh to pay off the mortgage of Kurpen Chetty. It was contended on behalf of the plaintiff that, inasmuch as the sale to Syed Massim had been declared void, as having taken place after the establishment of a *lis pendens*, between plaintiff and defendant, he could have no claim whatever upon the land in question, but must look to his vendor Ah Moh for the re-payment of the purchase money. A valid charge, however, had been established upon the land by the mortgage to Kurpen Chetty nine months before the commencement of the *lis pendens*, and if matters had remained as they were, and there had been no sale to Syed Massim, the Court, in making a decree, would have had to make it subject to the lien by Kurpen Chetty upon the land, for the amount of his advance to the mortgagor. Syed Massim undoubtedly purchased the land from Ah Moh after the concurrence of a *lis pendens*, and though it was a direct sale by Ah Moh to Syed Massim, it was a sale by Ah Moh, for the avowed purpose of clearing off the mortgage, and the mortgagee was paid then and there, the amount of his mortgage debt by Syed Massim before any of the purchase money reached Ah Moh. If the sale is void to all intents and purposes, as contended by the plaintiff, then Kurpen Chetty still remains the mortgagee of the land in question, and has improperly received the amount of his mortgage money, and being liable to refund that to Syed Massim, he would have recourse to his lien upon the land to enable him to do so. Otherwise the plaintiff would be placed by this void sale in a so much better position, that he would obtain the land free altogether from the lien, and that too at Syed Massim's expense. The case of *Bellanny v. Sabine*, 26 L. J., Ch. [N. S.] 797, to which I referred in my previous judgment, bears me out, however, in considering that the *lis pendens* does not prevent the lien of Syed Massim from attaching. Syed Massim is bound by the decree, he forfeits his contract and all the benefit arising from it. The doctrine of *lis pendens* is that after its establishment, neither party to the litigation can alienate the property in dispute so as to affect his opponent. In this case the defendant did attempt to alienate the property in dispute by a sale to Syed Massim, and by the decree, that sale is set aside altogether. But Syed Massim went further than the mere contract for the purchase of the land. On the faith of the *bona fides* of the transaction, he paid the purchase money, and out of that the Chetty was paid the full amount of his claim, and the Chetty transferred the whole of his interest, so far as he could, to Syed Massim. I think, therefore, as I thought before, that Syed Massim acquired at all events the same interest in the land that Kurpen Chetty had. To hold otherwise would be, as it appears to me, to carry the doctrine of *lis pendens* further than it has yet been carried. It is hard enough upon Syed

SIDGREAVES,
C. J.
1876.

LEE AH YIM
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SIDGRAEVES, Massim, that he should lose the benefit of his contract altogether, without any default on his part, but it would be very much harder if, in addition to that, he were deprived of possibly the only means of obtaining the repayment of the purchase money which he had *bona fide* advanced on the faith of the contract being carried out. The decree therefore, as amended will stand.

C. J.
1876.
—
LEE AH YIM
v.
CHEO AH
MO & ORS.

MUSHROODIN MERICAN NOORDIN v. SHAIK EUSOOF.

PENANG.
—
PHILLIPPO,
J.
1876.
—
June 8.

The defendant having received an impertinent message from the plaintiff in reference to another matter altogether, in a spirit of resentment wrote an anonymous letter to the Superintendent of Police, charging the plaintiff with having poisoned his late wife, and expressing a hope that he would be taken into custody, and the matter enquired into. At the trial the defendant could not, and in fact did not attempt to, prove the truth of his assertions—he, however, gave evidence of certain facts which were suspicious attending the woman's death, and that reports to the same effect as that stated in the letter, were generally circulating in town, concerning the plaintiff.

Held, the communication was not privileged, and the defendant was liable in damages for libel.

This was an action to recover \$10,000, for libel: the facts and arguments sufficiently appear in the judgment.

Clarke, for plaintiff.

Ross, for defendant.

September 7. *Phillippo, J.* In this case the plaintiff sued the defendant to recover damages for libel, on account of an anonymous letter written by the defendant to Mr. Plunket, the Superintendent of Police, which letter is as follows:—

To

“The Hon’ble Plunket.

“The woman named *Ering* was poisoned by Chay Mut Din, *alias* “Mushroodin Merican Noordin, and carried away her corpse to Pulo Ticoos “at night—why does he not arrested, because he is a rich man’s son. This “news was well known in town. No examination was made up to this day “because he is a rich man’s son. I hope you will, at once, take him to custody “and enquire it.

“Yours,

“A. C.”

There is do doubt that in this letter there was defamatory matter, amply to maintain this action unless the letter could be justified in law or unless the circumstances under which it was written, were such as to make the communication privileged. If this communication had been made by the defendant in an honest belief that he was performing his duty in making it, and I was convinced that it was fairly made by him in the discharge of what he believed to be a public duty, I should have no hesitation in holding that it was privileged, even although it contains charges or statements that the defendant is unable to prove, and that it could not be made the subject of an action of libel. But in this case the letter itself displayed, in my opinion, a certain animus against the plaintiff, especially considering the relationship of the parties—it was proved that there had been

differences between the plaintiff and defendant—and the defendant could not deny, in fact, he admitted that he would not have sent the letter in question to Mr. Plunket, but for his having received what he considered an impertinent message from the plaintiff, and no one who observed the demeanour of the defendant in the witness box could help coming to the conclusion that the defendant sent the letter in question on account of feelings of resentment towards the plaintiff. I do not consider, therefore, that the communication was made by the defendant *bonâ fide* or fairly in the discharge of what he believed to be a public duty, and therefore, he is liable in damages to the plaintiff unless he could have justified his having written the letter on the ground of its truth. This he has not attempted nor did he raise any such defence by plea, but he has endeavoured to shew in reduction of damages that there were suspicious circumstances attending the death of the woman referred to in the letter, and there were reports of the same nature circulating at the same time with regard to the conduct of the plaintiff. I think, that the defendant has succeeded in shewing that the plaintiff by his own imprudence to say the least of it, brought the greater amount of damage which he alleges on himself, and that even if the defendant had not made the communication he did to the police, the matter was one involving suspicion and requiring investigation, and would probably have been investigated. Besides this, the charge upon which he was arrested was not made upon the letter in question, but upon a sworn information made by the defendant to the Superintendent of Police, and corroborated to some extent by Mr. Green, the last medical attendant of the woman Ering, and the statements made in the Information are not alleged to have been false. At the same time, however, the defendant was not justified in bringing so serious a charge against the plaintiff as he did in the letter to the Superintendent of Police, through irritation caused by what he considered an impertinent message, and he must pay the penalty for his unjustifiable act, as he is unable to prove the truth of his assertions. As the plaintiff brings this action in some degree to vindicate his character, I think it right to state that no evidence has been brought forward to shew that poison was wilfully administered to the woman referred to by any one, much less that the plaintiff had anything to do with administering it, and all the suspicious circumstances alleged are entirely consistent with his innocence of the serious charge made against him.

The plaintiff claims \$10,000 damages. Had he been free from any blame in the matter, and had there been no foundation whatever for the charge made in the letter in question, I should have been disposed under the circumstances to have given more substantial damages than I am now prepared to do. Taking everything into consideration, I consider, that I shall be doing what is right between the parties, and in the interests of the whole community, by assessing the damages to be paid by the defendant to the plaintiff at the sum of \$500.

There will, therefore, be a verdict and judgment for the plaintiff for \$500.

PHILLIPPO,
J.
1876.

MUSHROODIN
MERICAN
NOORDIN
v.
SHAIK EU.
SOOF.

NEOH CHIN TEK & ORS. v. TAN BEOW. [a]

PENANG. Part payment does not take a case out of the Statute of Limitations, [Act XIV. of 1859.]

PHILLIPPO, J. The defendant's absence out of the jurisdiction does not prevent the Statute running, where he might have been served with a summons.

1876. *Semble.* The provision in Act XIV. of 1840 regarding part-payment, is impliedly repealed by the provisions of the Limitation Act XIV. of 1859, which limits acknowledg-

November 28. ments of Statute barred debts, to acknowledgments in writing.

Action for goods sold and delivered, money lent and on accounts stated. Plea, the Statute of Limitations, viz., three years. The plaintiffs relied [1] on a part-payment made by defendant within that period; [2] the defendant's absence beyond the jurisdiction.

Thomas, for plaintiffs.

Van Someren for defendant [*in formâ pauperis.*]

Cur. Adv. Vult.

December 13. *Phillippo, J.* In this case the question arose as to whether part-payment of a debt would prevent the operation of Indian Act XIV. of 1852 as to the residue. As I had very great doubts on the subject, I reserved the point in order to consider the Indian cases, and authorities upon the subject. It appears from *Thomson's Limitation of Civil suits* [page 246], that a provision by which "a part-payment on account of principal or interest" was allowed to give rise to a new period of limitation, was purposely omitted from the Indian Act.

Since the passing of that Act, part-payment has had no effect in taking a case out of the Statute of Limitations, until the passing of Act 9 of 1871, which, however, is confined to certain special cases. The cases upon the subject are collected in Broughton's Civil Procedure Code [pages 550 & 567]. *Thomson's Limitation of Civil Suits* [p. 246 *et seq.*]

In the case of *Rajah Jevara Das v. Richardson*, 2 Madras 84, referred to in *Thomson* [p. 247], Mr. Justice Bittleston made the following observations with which I entirely concur:—

"The part-payment of a debt has no effect in preventing the operation of Act XIV. of 1859 as to the residue. The prescribed period of limitation begins to run as soon as the debt is payable; and, obviously, the payment of a part of the debt does not, in any degree, lessen the period during which the balance has been payable. But according to the decisions of the English Courts since the Statute of James, a part-payment has been treated as an acknowledgment of the debt, amounting to, or affording evidence of a new promise to pay the balance. It is upon this ground only that part-payment has, according to English law, the effect of giving a new period of limitation from the date of the part-payment. But section 4, of the Indian Act expressly gives a new period of limitation in the case of a written acknowledgment of a debt, while it is wholly silent as to any such effect arising from part-payment; though in the Act there are two instances, Clause 13, of Section 1, and Section 6, in which the original period of limitation is made to run from the last payment on account. A reference to the English legislation on the same

[a] It is more than likely that when this case was decided, the Court was not aware of the like decision of Maxwell, C. J. at Singapore, in re: *Mahomed Ghouse v. Rabia*, ante p. 214

subject strongly supports the view, that the Indian Legislature did not intend that payment of part of a debt should give to the creditor a new period of limitation from that time. Before the statute 9, Geo. IV. C. 14, the decisions had established three modes whereby a case might be taken out of the operation of the Statute of Limitations. These were, first, acknowledgment by words, secondly, a promise by words, and thirdly, part-payment, and that Statute since it provided that no acknowledgment or promise by words only should be sufficient for that purpose, and that nothing therein contained should take away the effect of any payment, clearly applied to the first and second methods only, and not to the third, so that when the English Legislature took away from parol acknowledgments, the effect which had been given to them by the decisions, they expressly reserved the effect of part-payment. Again, the Statute 3 and 4, Wm. IV. c. 42, s. 5, uses language very similar to that of the 4th section of the Indian Act; but it expressly puts acknowledgment by writing, and acknowledgment by part-payment on the same footing, and gives a new period of limitation from the one as well as from the other. The Statute 9, Geo. IV. was expressly extended to India by Act XIV. of 1840, and the Indian Legislature must be taken to have had before them, not only that Act, but, also the other Acts of the English Legislature upon the same subject, when they were framing the Act XIV. of 1859. With these Acts then before them, they have expressly provided for the single case of an acknowledgment in writing, giving to that the same effect which it has, by the English law, and so doing, have impliedly excluded every other acknowledgment—an acknowledgment by part-payment just as much as an acknowledgment by words only."

PHILLIPPO,
J.
1876.
—
NEOH CHIN
TEK & ORS.
v.
TAN BROW.

A second objection was taken in this case, namely, that the defendant was admittedly residing out of the jurisdiction of the Court; but as he might have been served with a summons under section 32 of Ordinance V. of 1868, this objection is not available under section 13 of Act XIV. of 1859.

There must, therefore, in this case be judgment for the defendant.

CHEAH OON HEAP v. CHOAK KONG WHAT.

In an action for malicious prosecution, it is no defence to say, that the defendant acted on what he was told. Before laying a criminal information, he is bound to enquire, and test the information given him; and if he neglects to do so, he acts without reasonable and probable cause.

PENANG.
—
PHILLIPS, J.
1877.

This was an action to recover \$1,000 damages for a false and malicious charge preferred in the Police Court by defendant against the plaintiff's wife, two female children and servants.

Plaintiff and defendant resided in the same row of houses in Penang Street, one dwelling only intervening between them. The defendant being annoyed by stones thrown into the Court-yard of his house, his suspicions were aroused against plaintiff's household, and he obtained the assistance of the police to watch the premises. From information defendant obtained by this course, he preferred an information before the Magistrate against the female members of plaintiff's family. The defendant failed to prove his case, and the present action resulted.

July 18.

Thomas, for plaintiff.

Ross, for defendant.

Phillips, J. It is not sufficient defence to say to this Court, I acted upon what I was told. Before laying a Criminal Informa-

PHILLIPS, J.
1877.
CHEAN OON
HEAP
v.
CHOAK KONG
WHAT.

tion, a person is bound to enquire, and test the information given him, and if he neglect to do so, he brings his case before the Magistrate at his own will. In this case had the defendant examined into the evidence, before he commenced proceedings, he would have discovered that he could not substantiate the charge. I cannot entirely acquit the defendant from having acted maliciously, and without reasonable and probable cause, which has resulted in bringing disgrace, in the eyes of his fellow-countrymen, to the plaintiff and his family. The defendant has evidently been actuated by idle female gossips, and absurd superstitions, which I should not have supposed, a Chinese, in defendant's station in life, and a long resident of an English Colony, would have given credit to.

He has declined to express any regret for the injury he has inflicted on the plaintiff for dragging his family into a discreditable position before the public, and for this conduct, I must give more than nominal damages.

Damages \$50. [a]

VERNON ALLEN *v.* MEERA PULLAY & ORS.

PENANG.

WOOD, J.
1877.

Sept. 26.

An agreement made between two persons, each of whom was desirous of obtaining a certain contract, that they should not tender against each other; that one should do so, and if he got it, should hand same over to the other, in consideration of payment of a commission at a certain rate—but which contained no clause, making it obligatory on that other to make the tender, or restraining him from having a share, directly or indirectly, in the tender of anybody else—is not void for want of mutuality, or as being in restraint of trade.

An agreement, the stamp of which is cancelled, under Ordinance 8 of 1873 with only the date, but not also with name or initials, is not “duly stamped” within the meaning of that Ordinance.

Held, by the Privy Council, however, [reversing the judgment of the majority of the Full Court of Appeal of the Colony] that the Collector had power under section 26 of the Ordinance, to rectify the omission.

This was an action to recover the sum of \$8,420.85, as damages for breach of agreement, and on the common money counts besides costs of suit. The agreement on which the action was brought, was in the words and figures following:—

“It is this day mutually agreed upon between Vernon Allen, of Province Wellesley, on the one part, and Verepa Pully, [meaning thereby the defendant Meera Pullay], Shaik Ibram [meaning thereby the defendant Shaik Ibrahim], and Hajee Matt Salay, [meaning thereby the defendant Hajee Mahomed Salleh] on the other part; that should Vernon Allen obtain the contract for supplying the Dutch at Acheen through Messrs. Katz Brothers of Penang, that he is to hand over the contract to the second party in this agreement, [as above-named] and that they, the second party, are to pay to Vernon Allen, the first party, a commission, on all payments for supplies, at the rate of two-and-a-half per cent. Should the second party, in this agreement, or any one of them get the above contract from the above or any one else, they, the second party, are to pay to Vernon Allen the sum of two-and-a-half per cent. commission on all payments for supplies, or further, should they or any one of the parties in this agreement supply anything whatever for the Dutch at Acheen, they or any one of them agree to pay to Vernon Allen, a commission of two-and-a-half per cent. in all, any and everything, they may supply, Vernon Allen also agreeing to hand over to them, the second party, any contract for supplies he may in any way obtain, they paying him according to the forementioned terms of this agreement.

[a] See *Nelligan v. Wemyss & anor.*, 13th July, 1883, *infra*. *p. 619*

"In witness hereof, we have hereunto fixed our mark or signatures in the presence of

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[Signed] "MICHAEL JOSEPH SCULLY.

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[„] "AHAMAD BIN ABDULLA,
in Arabic characters.

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[„] "VERNON ALLEN.

"MEERA PULLAY, *his mark.*

[„] "KANA SHAIK IBRAHIM,
in Tamil characters.

[„] "HAJEE MAHOMED SALLEH,
in Arabic characters.

"The tenth day of August, 1875."

It bore a stamp of 50 cents., which was cancelled only with the date. At the trial, the plaintiff tendered the agreement in evidence.

Van Someren, for the defendants, objected to its admission on the ground that the agreement was not duly stamped. He relied on section 25 of the Stamp Ordinance 8 of 1873, and section 12, para. 2, and contended that the agreement in question being cancelled by the date alone being written on it, was insufficient, as the stamp should have been cancelled by the plaintiff, [as the person first signing it] writing on or across it, his *name* or *initials*.

Ross, for the plaintiff contended that the agreement was, at all events, capable of being produced in evidence, after being duly stamped, and a penalty paid under section 26.

Wood, J. I think that the agreement is not duly stamped, because it was, although stamped with a stamp of sufficient amount, not sufficiently cancelled, by writing the date only; but I think that under section 26 of the Act, it can be stamped by the Collector, if satisfied that it was not intended to evade the law, for I consider that it is not "duly stamped"—duly stamping meaning, in an instrument of this kind, stamping with a stamp of sufficient amount, and duly cancelling such stamp as pointed out by the section.

The Court then adjourned for the day. On the following morning the agreement was again tendered in evidence, and it appeared that, in the interval, the plaintiff had had a stamp penalty of \$1, together with a new 50 cents stamp affixed to the agreement, and these stamps cancelled by the Collector of Stamps with his name and date.

Van Someren again objected to its admissibility. The Court overruled the objection. The case proceeded, and on the conclusion of the plaintiff's case,

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Van Someren contended that the agreement was void for two reasons. 1st., There was no mutuality. The contract was binding on the defendants to pay 2½ per cent., but not on plaintiff, to perform his part of the contract. *Lees v. Whitecombe*, 5 Bing. 34, *Sykes v. Dixon*, 9 A. & E. 693, *Smith on Contracts*, p. 119, *Chitty on Contracts*, p. 13 *et seq.*, 2nd., the agreement was in restraint of trade. *Broom's Commentaries*, p. 363; *Young v. Timmins*, 1 Cr. and Jervis 33.

Evidence for the defence was then gone into. On the conclusion of this evidence, on

2nd October. *Wood, J.* To the argument of Mr. Van Someren that the contract is void, for want of mutuality and in restraint of trade, I hold that there is mutuality, and that it is not in restraint of trade within the meaning of the cases. *Chitty on Contracts*, pp. 13, 14, & 616. I hold that the judgment must be against the defendants.

The defendants thereafter obtained a rule, calling on the plaintiff to shew cause why an appeal should not be allowed.

Ross, shewed cause.

Van Someren, in support of Rule.

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7th January, 1878. *Wood, J.* In this case, a rule was obtained, calling on the plaintiff, to shew cause why an appeal should not be allowed from the ruling of the Judge, sitting at Penang, to the Supreme Court of the Straits Settlements sitting as a Court of Appeal.

The action was brought by the plaintiff against the defendants on the Plea Side of the Supreme Court to recover damages for breach of an alleged agreement, whereby, it was contended, that defendants had promised to pay to the plaintiff a certain commission, in the event of their obtaining from the Dutch Government, a contract for the supply of beef cattle.

After hearing the case, I decided that judgment must be for the plaintiff, and awarded damages to the amount of \$6,279.31. Several points of law arose on the trial, and questions had previously arisen on demurrer, which were argued before Mr. Justice Phillips. After the trial, Mr. Van Someren for the defendants, obtained a Rule calling upon the plaintiff to shew cause why an appeal should not be allowed from the judgment given herein on the ground, 1st., of material evidence being improperly received, 2nd., of such judgment being erroneous in point of law. On the rule coming on for argument, Mr. Ross, the Counsel for the plaintiff, shewed cause.

With respect to the points of law raised at the trial, so much has been already said, that it is needless now to repeat it, and it may be sufficient for me to say that nothing has passed in argument which, in any way, alters my view as expressed at the trial. nor, indeed, am I now desired by the Counsel on either side to dwell upon these points any further: and as these points appear to me to be such as are fairly arguable, and not by any means frivolous,

or trifling, the defendants have, in my judgment, almost as of right the privilege of appeal, and I should, as I think, greatly misapprehend my duties, did I not freely grant to them on these grounds, so far as in me lies, the right to appeal. But, independently of these grounds it was contended, on behalf of the plaintiff, that it would be impossible for the Judge to grant the rule as asked for, if he should be of opinion that there was in existence, no such Court as the Court of Appeal of the Straits Settlements. On this point Mr. Ross contended as follows:—

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Before the time of the passing of Ordinance 5 of 1873, two separate jurisdictions existed in the Straits Settlements, with two judges, one for each jurisdiction—one of these judges was the Chief-Justice of the Straits Settlements, the other the Judge of Penang, each had his own Court, and they could not, by law, sit together.

Ordinance 5 of 1873, for the 1st time constitutes a Supreme Court of the Straits Settlements.

Section 2 constitutes the Supreme Court, which it is declared shall “consist of and be holden, by and before the Judge to be called the Chief-Justice of the Straits Settlements, a Judge to be called the Judge of Penang, a Senior Puisne Judge and a Junior Puisne Judge.”

Section 3 declares that it shall “consist of 2 divisions, one to be held at Singapore and Malacca and one at Penang.”

Section 8 defines the presiding judges of each division.

Section 21 provides that writs, &c., are to be tested in the name of the judge presiding over the division of the Court where the process is issued.

Section 83 constitutes the Court of Appeal, and it is there provided: “That the Supreme Court shall be a Court of Appeal with jurisdiction to hear and determine appeals in such matters, tried before any of the Judges of the said Court as may be prescribed by law.”

By Section 84 “Such Court of Appeal shall be constituted as follows:—

“1st.—A Full Court of Appeal to consist of all the four Judges or of not fewer than three Judges, and to be presided over by the Senior Judge present.”

“2nd.—A divisional Court of Appeal to consist of the presiding Judge and Puisne Judge at the Settlement where held.”

By section 85, appeals in all matters heard or tried before either of the presiding Judges, shall ordinarily be heard before a Full Court of Appeal.

By section 86. The full Court of Appeal shall assemble for the hearing, &c., of appeals once every year at Singapore, and once every year at Penang, at such times as the presiding judges may appoint, and special Full Courts of Appeal may be held at any Settlement by order of the presiding judges, whenever occasion may arise for the same.

Sections 89, 90, 91 and 92, which relate to divisional Courts of Appeal, clearly contemplate divisions and presiding judges, while section 93 which relates to magistrates’ appeals, orders them to be heard before presiding judges.

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After the passing of this Ordinance No. 17 of 1876 was passed to amend Ordinance 5 of 1873. By section 2 of this Ordinance, The Supreme Court is reconstituted. It is provided that "the "Supreme Court shall be held before two Judges," and a third if appointed—but does not in terms give the powers of a presiding judge to any of the new judges, and in particular does away with the office of Judge of Penang, and substitutes no other judge with his exact powers—section 4 provides for the testing of writs in the name of the Chief-Justice—section 8 referring to appeals from the decision of magistrates,—substitutes in direct words, a Judge of the Supreme Court, at any Settlement, for the *presiding judge*.

Thus, it was argued, taking together the two Ordinances, it is clear that Ordinance 5 of 1873, constitutes a Court with two divisions and two presiding judges, and directs that the Supreme Court so constituted, shall be a Court of Appeal. Ordinance 17 of 1876, reconstitutes the Court, and as clearly takes away the divisional character of the Court. Thus this element of the constitution of the Court failing, the Court as a Court of Appeal, must fail also.

Act No. 9 of 1874 which merely supplies machinery to the Court of Appeal established in 1873, stands and falls with it, and it may be remarked that by section 1 of the Rules and Orders of the Supreme Court, it is clear, that the judges contemplated, presiding judges, as persons who were requisite to fix the times of sitting of divisional Courts of Appeal.

Mr. Van Someren in support of the Rule, contended that the Court of Appeal still existed, since by sections 83 and 86 of Ordinance 5 of 1873, a Court of Appeal is constituted. The question is whether these sections, have been repealed by Ordinance 17 of 1876. If such repeal is effected, it is by implication, and not by express word. That such a repeal is not readily to be admitted, is shewn by the Rule of law, which requires that the Court should lean against any construction of an Act of the Legislature which tends to repeal an institution of known importance and value. *Broom's Legal Maxims*, ed. 1858, p. 26. But Ordinance 17 of 1876, not only names the Ordinance of 1873, but it deals with certain specified sections of it. Thus, section 9 of the Ordinance of 1876 specifically enacts that the Ordinance of 1876 "shall be construed with, and as part of the Ordinance of 1873." Thus, in case of any inconsistency being shewn to exist between the provisions of these two Ordinances, the Court will read the intention so as to give effect to both ordinances. It is in fact, reasonable to hold that the Court of Appeal still exists. The inconsistencies are not so very great, but that they may be reconciled—further, the inconsistency would be one sided, for it may well be contended, that there does exist a Court of Appeal at Singapore—in as much as there is a presiding judge at that Settlement. "Presiding" inasmuch as he does preside, whether over a division or not, is not material.

The Interpretation Act of 1867, throws some light on any supposed involvement in language, by enabling us to read in the

construction of an Act, singular for plural and plural for singular. It may well be contended, that there does exist a Court of Appeal, for section 83 of the Ordinance of 1873, says, in express words: "The Supreme Court shall be a Court of Appeal" and the Ordinance of 1876, does not contradict it. It does not destroy the Supreme Court, though it cannot be denied that the constitution of the Court is varied; yet, if we are to obey the provisions of the Ordinance of 1873, it *must still* be a Court of Appeal, and the existence of this Court must be supported, if we desire to carry out the direct expression of the Act of 1873 "*ut res magis valeat quam pereat.*"

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Again, by section 84 of the Ordinance of 1873, there is to be a full Court of Appeal if three Judges can be got. By the Interpretation Act above alluded to—No. 14 of 1867, the "Judge" shall mean "any Judge of the Supreme Court *for the time being,*" and as the Ordinance of 1876 contemplates the *appointment of a 3rd Judge*, when he is so appointed, the materials for a Full Court of Appeal exist within the Colony. If there is no Court of Appeal in the Colony, there can be no appeal to the Privy Council, under Statutory enactment, for by the Appeal Act of 1874, section 47, clause 2, no such appeal can be had, except from an order of the Court of Appeal.

Although by section 86, the presiding judge is to order the time of the sitting of the Court—yet, for the reasoning above adverted to, "presiding," does not necessarily mean,—"*presiding judges of division,*"—but judges *de facto* and actually presiding.

In the course of the argument, it was suggested, that since by the Ordinance of 1873, the Supreme Court is a Court of Appeal, and although it can and should be called into existence as a Full Court by Presiding Judges, who no longer are in existence, yet, as a Court of Appeal, it has an inherent power of appointing its own time of meeting by consent of all, or a majority of its members. Mr. Ross opposed this view on the ground, that section 84, by the use of the words "such court," plainly showed that it could only be composed of materials, which are no longer in existence, that the words "four Judges" mean four of the Judges created by the Ordinance, or by the words "not fewer than three Judges," must mean, three of such four Judges, and not judges of any sort, but judges of a specific sort. That it is an extravagant construction to suppose that a Court which up to the appointment of the last Judge, may, by no legal enactment be a Court of Appeal, should become so, at once, by the appointment of a new judge.

It could not be contended that section 83 of the Ordinance of 1873, could stand alone. Sections 83 and 84 must go together and if they provide a machinery which has been destroyed by a late Ordinance; the machinery—failing—the Court of Appeal must fail also. The preamble of the Ordinance of 1876 shows that that Ordinance is imperfect "as pending arrangements" for the reconstitution of the Supreme Court, and lastly, that even in Singapore the Chief Justice, is not in a proper sense, a "presiding" Judge; for, there is no one over whom he can be said to preside.

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Such being the arguments before me, I am asked to refuse this rule, if I am satisfied that there is in existence no Court of Appeal within the Colony. For very obvious reasons, I should be desirous not to give an opinion on this point, and partly because my expressing an opinion on this matter, is immaterial, inasmuch as an appeal might at once be had against my ruling, but more particularly, because I may be expressing an opinion respecting the action of a Court of which I am only a single member, all opinion, which ought only to be given—which, can authoritatively only be given—after full argument and consultation between all the members of the Supreme Court.

Still looking at the provisions of Ordinance 9 of 1874, which, for the purpose of this application, must be regarded as still capable of application, it is clear to me, that parties to a suit have a right to require of a Judge sitting alone, a fair expression of opinion.

By section 4 of this Ordinance of 1874, it is provided that on the matter of appeal, coming on for hearing, “the question of such right, shall be argued by the parties or their counsel, and *“decided by the Court on the day fixed, &c.”*

By section 5, it is provided that “If the rule is discharged the appellant may set the rule down for argument *“before the Full Court of Appeal.”*

Taking these two sections together, it seems to me clear, that although the refusal of the Court is immaterial to the right of the parties to appeal—yet, that, it is the intention of the Ordinance that, the Court should *decide* the matter submitted to them, and thus, that on such a rule as this being argued, points of law should be fully and exhaustively discussed, and the opinion of the Judge plainly expressed.

Acting on this view, I have accordingly held it to be my duty to deal with the points of law raised in the case, and in particular with the point of law, as to whether the Court of Appeal given by the Ordinance of 1873 still exists.

The points of law have been already dealt with, but on the point of whether the Supreme Court of the Straits Settlements is still a Court of Appeal, a point which of necessity is, so far as this case is concerned, now, for the first time raised, I am asked to give a decided opinion, and to this request, I freely accede. To the best of my judgment, the argument rests altogether within a very narrow compass. By section 83, the Supreme Court as there established, is to be a Court of Appeal by section 84. It is declared of what “such” Supreme Court, when sitting as a Court of Appeal, shall consist. That is to say, of the four Judges created by that Ordinance, *viz.*, two Presiding Judges, and two Puisne Judges or of not fewer than three of, as I read it, *such* Judges—and the subsequent whole structure of the Act shews that the Supreme Court of 1873, is a Supreme Court of two divisions. For the proper settlement of points of law arising in either of these two Courts of independent authority, some Court of Appeal in the Colony, might be looked upon as reasonably necessary, and the Supreme Court, of which these are portions, would seem to be at once the most obvious and the most reasonable. Indeed, the Supreme Court of 1873 sitting

as an aggregate of all its Judges, appears to me to have no other function or entirety, except as such Court of Appeal, for the idea of the Supreme Court of 1873—sitting with its full Bench as superior Courts of Law, sit in other places—has never been entertained by the public or the profession, nor, as far as I can see, been contemplated by the Ordinance of 1873.

The Ordinance No. 17 of 1876, by section 2, most unmistakeably destroys the divisional character of the Supreme Court, but creates no new Court of Appeal—and as the Supreme Court when sitting in appeal, consists as it appears to me under section 84 of the Ordinance of 1873 of such divisions, the Ordinance of 1876, by destroying the materials of the Court, must be held to destroy its existence also.

It seems to me to be plain as the demonstration of any fact in physics. A Court consists of certain constituent elements,—if those elements are destroyed, the Court is destroyed also. I am not aware of any principle or maxim in the construction of statutes which can aid us. We cannot, that I am aware, in any way, build up a new Court of Appeal, on the ruins of the old Supreme Court, or create a new Court of Appeal by analogy with the old one. Believing as I do, that the Ordinance of 1876, destroys the materials which go to form the old Court of Appeal, I am compelled to believe that the Supreme Court is as a Court of Appeal destroyed also.

I am happy to think that this expression of opinion, is of no material injury to the defendants in the cause below. They have still their rights of appeal, and if the matter is set down for hearing before the Court of Appeal, I may then submit with deference to the ruling of my brethren, or possibly be convinced by abler and sounder reasoning than that which it has been my duty to express.

I am thus, as it would appear to me, obliged to refuse the rule in the form asked for. Whether the Supreme Court exists in an aggregate form, and is capable of dealing authoritatively with the ruling of a single Judge, so as to enable the defendants to raise this question by resorting not to a Court of Appeal, but to a Court in Banc, I express no opinion, for the matter was not raised in argument.

It would, indeed, seem by no means an unreasonable supposition that the Act of 1876, by creating a Supreme Court without divisions, intended to provide the public with the more simple and familiar machinery of a Court in Banc in exchange for the anomalous, and, it might seem, now unnecessary institution of a Court of Appeal, but whatever, on first consideration, may be the views of the profession on this matter, the subject is one of importance to the public at large, and it would be well in any subsequent legislative enactment, that this power of the Supreme Court to hold sittings in a collective form, as a Supreme Court in analogy with the power and practice of other Courts of superior jurisdiction at home and in other colonies, and not as a Court of Appeal—should be dealt with in some definite manner and either absolutely recognized or absolutely withheld.

This rule is therefore discharged with costs.

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The Courts' Ordinance III. of 1878, having subsequently been passed, the defendants availed themselves of section 71 thereof, and appealed against the judgment of the Court below of 2nd October, 1877.

10th February, 1879. The appeal now came on to be heard before the Full Court of Appeal, consisting of *Sidgreaves*, C. J., *Ford* and *Wood*, J. J.

Van Someren, for appellants contended, the agreement was not duly stamped and could not be rectified under section 26—that the agreement was void for want of consideration, want of mutuality, and as being in restraint of trade.

Ross, for respondent *contra*, in respect of the restraint of trade, cited *Jones v. North*, 19 L. R., Eq. 426.

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14th February, 1879. The Court being divided in opinion, the following judgments were delivered:—

Wood, J. Upon the point of the stamp. The opinion I now entertain is much the same as that expressed on the trial. Under the provisions of s.s. 12 & 25, the agreement in question having been stamped with the stamp of proper amount, but that stamp not having been cancelled in the manner pointed out, the document in question was clearly not “duly stamped” within the meaning of the Act.

When ultimately tendered in evidence, it appeared before the Court, with the old stamp, still uncanceled, and bearing upon it a stamp of \$5. put on by the Collector of Stamps, and the question then arose whether it was admissible in evidence, and upon this point, I hold as I held at the trial, that it was. Section 26 provides as follows:—

Clause 1. “If any instrument required by law to be stamped, “shall have been signed or executed by any person without its “being duly stamped, and special provision to meet such case, is “not made in this Ordinance, the Collector of Stamps, if satisfied “that there was no intention to evade payment of the proper “Stamp duty, may direct such instrument “to be properly stamped “as follows”:—

Clause 2. “If the instrument be produced to the Collector “within one week from the time of its execution, it may be “properly stamped, on payment of a fine of five dollars, or double “the amount of proper stamp duty, if that amount does not exceed “five dollars.”

Clause 3. “If, produced after one week but within 3 months “a fine of twenty dollars, or four times the amount of proper “stamp duty, if that amount does not exceed twenty dollars.”

Clause 4. “If, produced after 3 months, a fine of fifty “dollars, or ten times the amount of proper stamp duty, if that “amount does not exceed fifty dollars.” It is clear that this document being *not duly stamped* could be *properly stamped*—by the Collector—and it is admitted, on all hands, that it was

properly stamped—but there arises the question, is it then admissible in evidence, it still being *not duly stamped* within the meaning of sections 12 & 25. Let us first call in aid the general objects and provisions of the Ordinance in question, and subject it may be to imperfections and omissions, *the general object and intention* can only in reason and in justice, be as follows: To provide for a revenue, and to enable persons who have failed to stamp their documents in the manner pointed out by the Ordinance, without having had any intention to evade the payment of the stamp duty, to avail themselves of the documents, which require a stamp to enforce their rights or to escape the penalty inflicted for not stamping in the manner pointed out by the Ordinance, upon payment of a penalty. And that section 26 is intended to qualify the rigour of sections 12 & 25, in the interests of simple reason and justice. Section 26 above adverted to, enacts that a document not duly stamped may be *properly stamped*, on payment of the requisite amount of penalty—which payment of penalty, it is conceded, has been made, and the document comes for us as one *properly stamped*. In my judgment, the word “properly” means what in ordinary language it is known to imply, *viz*: “in a proper manner”—proper in manner and form—“not improperly in any respect”—“properly to all intents and purposes”—“properly to meet the ends of justice and objects of the Act,” and that to hold that properly stamped means *with a proper stamp*, is to apply, not only a forced signification to the words, but a signification which is contrary to the fair and reasonable intention and object of the Act. Indeed, I should say, that *properly stamped* was for all the purposes of this Act, synonymous with *duly stamped*—but that the use of the word *duly stamped* would be improper, inasmuch as by a previous section, it has received a technical and forced construction, having relation to contemporaneous cancellation, which makes it inapplicable here. Thus, I cannot but consider that the document so stamped was duly receivable in evidence. That the stamp ordinance in question is unfortunately imperfect, that it is oppressive and penal to a degree which leads to notorious and unchecked disregard of its provisions and penalties, is much to be regretted, but forms no part of the reasoning which guides me in this judgment. I look to the general provisions and objects of the Act, to the fair meaning of the word “properly” and to the canons of construction, which require us to deal strictly with Tax Acts in the interests of the public in general, to provide and to provide only for the carrying out of the Ordinance, when the results of such carrying out are faulty, partial or unreasonable only when such Ordinance speaks in terms which are clear and unambiguous.

As to the general result of the appeal, I think that the judgment of the Court ought to be for a new trial, without costs, on the following grounds:—

The appeal is made by the defendants, on the ground of the improper reception of evidence by the Judge on the trial of the case, which being an error of judgment, on the part of the Court, entitles the defendants *ex debito justitiæ* to a new trial, and no

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more, and as a miscarriage of justice, has occurred. I think the Court has no reasonable authority to give to the defendants a greater privilege or right than by well established authorities he ought to have. *Archbold's Practice*, p. 1505, and the authorities there cited, show that the improper reception of evidence by the Judge is ground for a new trial, and, presumably for no more, except under such special circumstances, as do not arise here but the reverse, seeing that, although by the judgment of this Court, the Court below, on a new trial, could not, without violating the principle laid down by this Court of Appeal, admit the document—on payment of penalty, yet *non constat* that in so clear a case of hardship as this—the Governor would not, under the powers given by section 31 of the Act, sanction its having the proper stamp affixed to it—which might, it is presumed, make it admissible in evidence.

Ford, J. I concur in the judgment of the Court below in all points raised by this appeal, except that raised under the provisions of the Stamp Ordinance 8 of 1873.

I confine my concurrence, however, with the decision that there was sufficient consideration and mutuality to sustain this contract, to that part of the contract actually sued upon, and for the explanation of some latent ambiguity in which parol evidence was admitted, shewing that Mr. Allen did tender for the Dutch contract then in the market, with an understanding with the appellants, that they should not tender. The question whether the contract is valid in respect of future dealings, is a different one and not now before us.

The question, however, of the admissibility in evidence of the contract itself, arose at the trial, and is now before the Court for consideration, the objection having been taken that the document was not duly stamped within the meaning of the Stamp Ordinance, and was, therefore, inadmissible under the provisions of the 25th section.

That section requires, as is admitted, unless some further provision in the Ordinance exists for rectification—that the document shall be duly stamped under the provisions of section 12, which enacts that “no instrument liable to stamp duty under “Schedule A”—a schedule which embraces the class of document in this case, “shall not be deemed duly stamped, unless the “official stamps be, of not less than the proper amount of duty “required by this Ordinance, and unless such stamp shall have “been cancelled, in the manner required by this Ordinance,” i. e., as is provided by the second sub-section “by the person who shall “first execute the instrument, or issue or deliver it out of his “hands, custody or power. Writing or marking in ink on or “across the same, his name or initials, or the name or initials of “his firm, or principal, together with the date of his so writing “or marking, so that every stamp shall be effectually cancelled “and rendered incapable of being used for any other instru- “ment.”

The facts of the case are short and simple. The contract in question was properly stamped as to amount, but the stamp was

not cancelled. Upon an objection being raised at the trial, the document was taken to the Stamp Office, and under the powers supposed to be conferred upon the office by the provisions of section 26, the Collector put or caused to be put on a new stamp of 10 times the original amount, and cancelled the stamp so put on. The question is, whether under that section, the Collector could so rectify the original error of non-cancellation as to make this document duly stamped and admissible in evidence.

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The Court below held that he could, and received the document. It is not disputed that, except under the provisions of section 26, the Collector has no such power, and it is, upon the proper construction of that section, the question must be determined. I need hardly say, that in reading the proper construction of a clause which may be ambiguous in language, the Court calls to its aid all those rules which may serve to show what the intention of the legislature is.

The section 26 is as follows:—

1. "If any instrument required by law to be duly stamped, shall have been signed or executed by any person without its being duly stamped, and special provision to meet such cases, is not made in this Ordinance, the Collector of Stamps, if satisfied there was no intention to evade payment of the proper stamp duty, may direct such instrument to be properly stamped as follows:—

2. "If the instrument be produced to the Collector within one week, from the time of execution, it may be properly stamped, on payment of a fine of five dollars, or double the amount of proper stamp duty, if that amount does not exceed five dollars.

3. "If, produced after one week but within 3 months, a fine of twenty dollars or four times the amount of proper stamp duty if that amount does not exceed twenty dollars.

4. "If, produced after three months, a fine of fifty dollars or 10 times the amount of proper stamp duty, if that amount does not exceed 50 dollars."

I am unable, I confess, to find in the language itself of the 26th section, any reason to conclude that, the power given to the Collector to direct an instrument to be properly stamped, necessarily implies that, when properly stamped, it is duly stamped, although, doubtless, if the context or rather provisions of the Act was not such as to indicate a different intention, such an application of the word "properly," as would make it synonymous with, or inclusive of "duly," might be sustained.

But I confess the language of the whole of the section, when taken together, implies to my mind, if not very clearly, yet, still a different intention, an intention which I think is strongly fortified by other provisions in the Ordinance, and the conclusions which correct reason would draw from them.

I call attention first to what I may call the fortifying evidence of the position that the Collector was not intended to have a power of cancellation; but could rectify only unstamped or insufficiently stamped instruments in the class of unduly stamped instruments brought to him under this section.

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The section excepts from its operation cases, for which special provision has been made, and, under section 21 of the Ordinance, unduly stamped bills of exchange, promissory notes and orders, are specially provided for. An express power is there given to the Collector to stamp a fresh *and cancel* the stamp put on, "and every such instrument so stamped as aforesaid, shall have the force and validity in law, as if it had been duly stamped before the same, was signed or issued."

The doctrine *expressio unius exclusio alterius* at once presents itself to the mind, on seeing this provision made for bills of exchange and promissory notes, but excluded from the class of instruments provided for by section 26, and its application to the case under consideration, is further strengthened by a reference to the marginal notes of the two sections. That to section 26 runs "Collector *may stamp* instruments not duly stamped in certain cases on fine"; that to section 21 runs "Bills of Exchange, &c., not stamped, *how rectified*."

It should also be observed that section 12 when setting forth the classes of documents to be duly stamped before execution, gives an express power of cancellation to the Collector. But the position that section 26 only intended to give a partial power of rectification is, I think, further strengthened by the provisions of section 13. The penalty by that section for non-cancellation is absolute—it is a fine not exceeding \$100. No penalty is attached to non-stamping or insufficiently stamping an instrument in any portion of the Ordinance unless presented for correction; section 13 carefully making it a mere breach of "duty" to execute an instrument without the proper stamp duty, whereas, as I have said, non-cancellation is *eo instanti* a punishable offence. That the Collector was not intended to have a power to relieve upon his own responsibility from a penalty of this kind is, I think, also a reasonable inference. These manifestations of intention, seem to me, borne out by the language of the 26th section itself. I have already called attention to the differences in its marginal note from that of section 21 which, *mutatis mutandis*, if an absolute power of rectification was intended, would naturally have run in the same words. Every reference in the section [see particularly clauses 2, 3 & 4] associate the words "proper and properly" with the amount of stamp duty. Clause I puts the Collector in motion only when he is "of opinion there is no intention to avoid the proper stamp duty"—an intention which could not be inferred from the non-cancellation or imperfect cancellation of the stamp, although an intention to pay no stamp duty by taking the uncanceled stamp off might—and he is then only to direct the instrument to be properly stamped. The words "unduly stamped" applied to the instrument when brought by the person seeking relief, are aptly enough used, for whether defective in stamping or cancellation, it is under section 12 unduly stamped. If the intention was to make a stamp unduly stamped in the point of cancellation, duly stamped in every particular when properly stamped, the section might have said so in plain words, or given the Collector a perfect power of rectification as under section 21 and

section 12. Looking at these considerations and to the special penalty imposed by section 13 on non-cancellation, I think, it may well have been in the mind of the Legislature in its zeal to protect the revenue under system of adhesive stamps, to have limited the relief the Collector could give to cases it specially provided for. Such at least seems to me to be the intention to be gathered from what the Legislature has said, and I do not feel justified, therefore, either upon the grounds of the inconvenience of another construction or any consideration of the more general purpose of the Ordinance, in amplifying the word "properly" so as to negative that intent. The Respondent must, I think, be left to any remedy he may have under section 31, which apparently empowers the Governor to sanction any instrument being duly stamped after execution, a power, which has frequently been exercised in Singapore, where doubts have long been current as to the power of the Collector, under section 26. I regret exceedingly to have to come to such a decision, feeling how unreasonable may be the penalties which may attach, as in this case, to an error in so apparently trivial a matter as non-cancellation of a stamp; but I fear the community will never be free from the possibility of such an inconvenience until some more satisfactory means are found of protecting the revenue than that of rendering unduly stamped instruments inadmissible in Courts of Justice. One method of protection against the loss sought to be provided against by requiring the cancellation of adhesive stamps, and of at the same time remedying what may become a public inconvenience, would be the return to the system of impressed stamps for such documents as they are suited to.

Sidgreaves, C. J. In this case the Court of Appeal were unanimous in considering that the agreement was properly admitted in evidence, if duly stamped, but on the question of its being duly stamped under the Stamp Ordinance 1873, we reserved our judgment.

After mature deliberation, I have come to the conclusion that the agreement was not duly stamped, and, therefore, could not be admitted in evidence under section 25 of the Stamp Ordinance. In my opinion the Court below was debarred by the express words of the Ordinance from receiving the agreement, as evidence in any civil proceeding, before the Court. The words of that section are as follows :—

"Except as otherwise provided by this Ordinance, no instrument for which any duty shall be payable under this Ordinance shall be received as creating, transferring, or extinguishing any right or obligation, or as evidence in any civil proceeding in any Court of Justice in the Colony, or shall be acted upon in any such Court or by any Public officer, or shall be registered in any public office or authenticated by any public officer, unless such instrument shall be duly stamped. Provided that every instrument liable to stamp duty, shall be admitted as evidence in any criminal proceeding, although it may not have the stamp required by this Ordinance affixed thereto."

Therefore, unless the instrument tendered in evidence, is *duly* stamped it must be rejected. There can be no doubt as to what

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duly stamping consists in, for we have an express definition of it in the first part of section 12:—

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“No instrument liable to Stamp Duty under schedule A, shall be deemed duly stamped unless the affixed stamp be of not less than the proper amount of duty required by this Ordinance, and, unless such stamp shall have been cancelled in the manner required by this Ordinance.”

In the case under consideration, the document tendered in evidence bore the proper amount of stamp duty, but the stamp had not been cancelled as directed by the above section. Clearly, therefore, it was not duly stamped, and, when first tendered in evidence, was rejected. The case was adjourned and resumed the following day, and then the document was again tendered in evidence. During the adjournment the document had been taken to the Collector of Stamps under section 26, which is as follows:—

Clause I.—“If any instrument required by law to be stamped shall have been signed or executed by any person, without its being duly stamped and special provision to meet such case, is not made in this Ordinance, the Collector of Stamps, if satisfied there was no intention to evade payment of the proper stamp duty, may direct such instrument to be properly stamped as follows:—

Clause II.—If the instrument be produced to the Collector within one week from the time of its execution, it may be properly stamped on payment of a fine of five dollars, or double the amount of proper stamp duty, if that amount does not exceed five dollars.

Clause III.—If produced after one week but within three months, a fine of twenty dollars, or four times the amount of proper stamp duty, if that amount does not exceed twenty dollars.

Clause IV.—If produced after three months, a fine of fifty dollars, or ten times the amount of proper stamp duty, if that amount does not exceed fifty dollars.”

The Collector acted upon the 4th clause of that section, and directed that a fine of ten times the amount of proper stamp duty should be imposed; and stamps to that amount were affixed to the document. It was then received in evidence.

Now, according to my construction of the Ordinance the document was inadmissible in evidence, unless it was duly stamped, and the only question would be therefore, whether it was so duly stamped or not. As the document bore the proper amount of stamp duty in the first instance, the Collector has, if what he has done has had the effect of converting it into a duly stamped instrument, the power of condoning the non-cancellation of the stamp by simply imposing a penalty. Whence does he get that power? not from the Ordinance as it appears to me. There his powers are strictly limited, and they only arise upon this contingency, viz., that he is “satisfied that there was no intention to evade payment of the proper stamp duty.” But how can there be any intention to evade payment of the proper stamp duty, when the proper stamp duty has already been paid? and even if that contingency does arise, his powers are limited to directing the instrument to be properly stamped, and, according to my construction of those words, it simply means that if the Collector is satisfied that there has been no intention to evade payment of the proper

stamp duty he may direct, subject to certain penalties, the proper amount of stamp duty to be affixed. I do not see, however, how the non-cancellation of an instrument properly stamped can be cured in this manner. A power of cancellation is given by the 21st section to the Collector in the case of bills of exchange or promissory notes, if brought to the stamp office to be stamped within three days from the date thereof, but no such power is given by the 26th section. The object of the Legislature, appears to me, to have been to protect the Revenue by enforcing the cancellation of the stamp in the first instance, and they sought to do that in two ways; first of all by attaching a penalty of \$100 to non-compliance with the provisions of the order regarding cancellation, and secondly, by enacting that no instrument bearing a stamp not properly cancelled, shall be received in evidence in any civil proceeding in any Court of justice in the Colony. The fact that the first protection to the Revenue against fraud given by the Ordinance has been made no use of, and indeed, has been practically abandoned, does not release those who have to administer justice in our Courts from enforcing the second. If these artificial attempts in local ordinances to carry out particular purposes, operate harshly and injuriously, it is for the Legislature to alter them, not for the judges, by a strained construction, to attempt to remedy the evil.

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Note.—The majority of the Court were of opinion that the proper course to pursue was to direct a verdict to be entered for the defendants, leaving the plaintiff to move for a new trial, if he thought fit, on such grounds as he might be advised.

The Respondent appealed to Her Majesty in Council.

On 24th January, 1882, the appeal came on to be heard before:—

LORD BLACKBURN.
LORD WATSON.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

Mr. *Mayne*, appeared for appellant.

Mr. *Charles*, Q. C. and Mr. *Mansel Jones*, for Respondents.

Sir Richard Couch. The suit which is the subject of the present Appeal, is brought upon an agreement made between the plaintiff and the defendants by which it was agreed that if the plaintiff should obtain the contract for supplying the Dutch at Acheen, through Messrs. Katz Brothers of Penang, he was to hand over the contract to the defendants, and that the defendants were to pay to the plaintiff a commission on all payments for supplies at the rate of 2½ per cent.; and should the defendants or any one of them get the contract, then they were to pay to the plaintiff

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2½ per cent. commission on all payments for supplies ; and further that if the defendants or any one of the parties to the agreement should supply anything for the Dutch at Acheen, they agreed to pay to the plaintiff a commission of 2½ per cent. The plaintiff's case was, that the defendants became the sub-contractors for the supply of cattle to Messrs. Katz for the Netherlands India Government at Acheen, and he claimed payment of the sum of \$8,420 for commission.

The defendants, in the first instance, demurred to the declaration, which demurrer was overruled, and they were allowed to plead ; and having pleaded pleas which went to the merits of the case and denied the right of the plaintiff to recover, but which are not material to be considered in this Appeal, the case came on for trial before one of the Judges of the Supreme Court of the Straits Settlements, division of Penang. At the trial the agreement was tendered in evidence ; and it appeared upon the face of it to bear a stamp of 50 cents, with a cancellation only by the figures "10/8/75."

Now the Ordinance 8 of 1873, in force in the Straits Settlements, provides by section 12 that, "No instrument liable to stamp duty under schedule A,"—which schedule included an agreement of this description,—“shall be deemed duly stamped unless the official stamp be of not less than the proper amount of duty required by this Ordinance, and unless such stamp shall have been cancelled in the manner required by this Ordinance ;” which manner is stated in the second sub-section to be “by the person who shall first execute the instrument, or issue or deliver it out of his hands, custody, or power, writing or marking in ink on or across the same his name or initials, or the name or initials of his firm or principal, together with the date of his so writing or marking, so that every stamp shall be effectually cancelled and rendered incapable of being used for any other instrument.” The omission was that, although the date of the cancellation appeared on the stamp, the initials had not been written.

The learned Judge adjourned the trial, and appears to have suggested that the parties might, if they thought fit, take some steps to remedy the defect under section 26 of the Ordinance ; and accordingly on the next day, the trial being resumed, the agreement was produced bearing upon the face of it a stamp of five dollars with the date “27/9/77,” the word “penalty,” and signed “P. Jones,” he being the Collector.

Here it will be convenient to refer to the provisions of the Ordinance which were made use of in getting this additional stamp affixed. Section 25, by reason of which the document was in the first instance refused to be received in evidence, provides, “Except as otherwise provided by this Ordinance, no instrument for which any duty shall be payable under this Ordinance shall be received as creating, transferring, or extinguishing any right or obligation, or as evidence in any civil proceeding in any Court of justice in the Colony, or shall be acted upon in any such Court or by any public Officer, or shall be registered in any public office or authenticated by any public Officer, unless such instrument shall

"be duly stamped," with a proviso that it may be admitted in evidence in a criminal proceeding, although it may not have the stamp required by the Ordinance. Then section 26 says, "If any instrument required by law to be stamped shall have been signed or executed by any person without its being duly stamped, and special provision to meet such case is not made in this Ordinance, the Collector of Stamps, if satisfied that there was no intention to evade payment of the proper stamp duty, may direct such instrument to be properly stamped as follows:—If the instrument be produced to the Collector within one week from the time of its execution, it may be properly stamped on payment of the fine of five dollars, or double the amount of proper stamp duty if that amount does not exceed five dollars. If produced after one week but within three months, a fine of twenty dollars, or four times the amount of proper stamp duty if that amount does not exceed twenty dollars. If produced after three months, a fine of fifty dollars, or ten times the amount of proper stamp duty if that amount does not exceed fifty dollars." It was under the last clause that the stamp of five dollars in this case was affixed. Upon the agreement being so produced before the learned Judge he held that it was admissible in evidence; and finding against the defendants upon the questions raised by the pleas, he gave judgment for the plaintiff. From that judgment there was an appeal to the Supreme Court under a provision in the Ordinances which gives an appeal on a matter of law; and the majority of the learned Judges of that Court, there being two besides the Judge who originally tried the case, held, that the agreement was still not admissible in evidence and reversed the judgment for the plaintiff, and directed a judgment to be entered for the defendants. From that judgment the present appeal is brought.

The sole question is, whether this was not a case to which section 26 of the Ordinance applied, and whether the agreement was not, by reason of the stamp having been affixed by the Collector under that section, properly admitted in evidence. That section is, in its terms, apparently intended to apply to all cases where the document has not been duly stamped, and for which a special provision had not been previously made, there being special provisions in the Ordinance for bills of exchange and other documents; and the words "without being duly stamped" would include not only cases where there was no stamp at all, or where the stamp was an insufficient one, but where, by inadvertence or accident, the stamp had not been properly cancelled. There might be many cases in which, from some mistake, there would not be a cancellation strictly within the term of the section, and where it would be more reasonable to give the parties an opportunity of remedying the defect in the stamp than even in cases where something had been done deliberately. Then, the words "not being duly stamped" being intended apparently to include all those cases, the section goes on to say that the Collector, if satisfied that there was no intention to evade payment of the proper stamp duty, may direct such instrument to be properly stamped. If the word "properly" is to be read, as it may fairly be, as meaning, not a stamp of the

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proper amount but properly stamped in all respects, not only of the proper amount but properly cancelled, and stamped in such a way as to make it admissible in evidence, then what may be reasonably considered to be the intention of the Ordinance, namely, that provision should be made for admitting documents which, through some cause or other, had not been properly stamped, admissible in evidence, would be carried out. On the other hand, if the word "properly" is to have a limited meaning, and is not to be read as being duly stamped, the effect would be this: that an opportunity is given to parties to go to the Collector and to pay the penalty, get the document stamped, and then, when they have got it stamped, if the defect was want of cancellation, it still could not be used in evidence; but if the defect was the want of a stamp, it might perhaps be used. The object of this clause in the Ordinance, coming as it does immediately after the 25th section, appears to their Lordships to be to provide for cases which it would be most reasonable to provide for; namely, that persons should not lose the power of suing upon an agreement or a document, because there had been some omission with reference to the stamping of it; that if the penalty was paid, they could then make use of the document to enforce their rights. This would further appear to have been the intention from what is done by section 30, because the legislature appears to have provided in cases of this kind two modes of remedying the defect. The parties may go to the Collector, and on paying the penalty they may get a document stamped in such a way that it can be made use of; but if they omit to do that, if the defect is not discovered, as it may sometimes not be, until the document is actually produced in Court, then it is provided that the Court may receive in evidence an instrument not bearing the stamp prescribed by the schedule on payment of the proper amount of stamp duty, to be determined by the Court. The Court may do what the Collector might do, and it is observable here that the Court is empowered to receive the document in evidence upon payment of the amount of stamp duty, but it is not necessary before it is received in evidence that the stamp should be cancelled. There is a direction afterwards that the officer of the Court shall cancel it; but it is not a condition precedent to its being received in evidence. It would be properly received, and the omission afterwards to cancel it would not make it less receivable: it would have already been received. In the case of its being produced in Court and the penalty being paid, it is to be received in evidence without the formal cancellation which, it is said ought to have been made under section 26, and which could not be made. Why should there be any difference between the remedy given to the party in the one case and in the other? The whole scope of the provision appears to be this: that under section 25, the document being declared not to be receivable in evidence unless it is duly stamped, the legislature says, Now, that being the state of things, a remedy shall be provided; and if the party pays the penalty which is prescribed and the stamp is affixed, then the document may be made use of. The construction which was put upon the Ordinance by

the learned Judges of the Lower Court, instead of being a reasonable and natural construction of its provisions, is in reality a forced one; and some of their observations appear almost to show that they felt that to some extent it was a forced construction.

Their Lordships therefore, are of opinion that the document was properly received in evidence by the learned Judge, and they will humbly advise Her Majesty that the judgment of the Court on the Appeal be reversed, and that the judgment of the first Judge do stand. The Respondents will pay the costs of the Appeal, and the Appellant will receive back his deposit.

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This Court will not recognize the right of an adopted son to share in an intestate's estate. SINGAPORE.

This was a demurrer to a statement of claim, praying for the administration of the estate of the above-named deceased.

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Cur. Adv. Vult.

October 9.

On this day, judgment was delivered by

Ford, ag. C. J. This is a suit praying the administration by the Court of the estate and effects of one Tan Eng Chek, deceased, and a demurrer to the petition has been filed upon the ground that the 2nd petitioner is only an *adopted* daughter of the intestate and as such has no interest in his estate and effects.

The defendant, it would appear, had obtained Letters of Administration to the intestate's estate, from a Resident Councillor at Malacca, in the year 1862, upon the strength of being an *adopted son* of the deceased, but the questions which might arise out of that grant, are not material for consideration in the present case, the question here being confined to the rights of the female plaintiff. It is stated, however, that although the defendant has administered as adopted son of the deceased, he would, were such administration defective, be entitled to administer as his nephew.

The rights of an adopted child to share in the estate and effects of an intestate adoptive father have been the subject of several decisions in the Supreme Court of these Settlements, in cases of administration of the property of Chinese, among whom, the custom of adoption largely prevails, but these cases have not unfortunately been decided uniformly.

It is not disputed that the same law is, however, applicable to each Settlement.

The first case of which we have any public notice is that of *In the goods of Abdullah*, tried by Sir Benjamin Malkin in 1835; [a] and the next a case of "*In re Chee Siang Long's Estate*" tried by Sir William Norris in 1843. Both the learned Judges, in these cases, decided that an adopted son or daughter of an intestate Chinese was to be preferred to the nephew, and it may be taken, I think, from their observations in the case, that they would have held adopted children of either sex entitled equally with other

[a] Ecclesiastical cases, Vol. II. of these Reports. 8

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children of the intestate—supposing such classes to co-exist. Sir William Norris, in terms, followed the reasoning and conclusions of Sir Benjamin Malkin, and each rested his decision on the expressions of indulgence and protection to be afforded to the various nations resorting to these Settlements, contained in the Charters constituting the Court, those of 1807 and 1826. It was admitted that this degree of protection and indulgence was not very clearly defined, but the learned Judges saw no objection in the case of Chinese to the admission of the custom of adoption amidst our laws of inheritance. The language of the Charters, [and in this respect the subsequent Charter of 1855, does not differ from prior ones, and its terms are still applicable to the Court as since constituted] shortly epitomized, established a Court of Judicature, which was to exercise all the jurisdiction of the English Courts of Law and Chancery, “as far as circumstances will admit,” and jurisdiction as an Ecclesiastical Court, “so far as the several religions, “manners, and customs of the inhabitants will admit.”

These cases were followed, I think, in order of date by the case of “*In the goods of Meh Allang*” decided by Sir Benson Maxwell in 1868, in which, administration was refused to an adopted daughter in favour of collateral next of kin; and this case is the one, I apprehend, referred to by that learned Judge a few months after in the case of *Regina v. Willans*, [a] as decided in ignorance of the previous decisions, but still upon further consideration, a decision he deemed correct.

In the case of *Regina v. Willans*—not, however, a case in which the question of adoption immediately arose, Sir Benson Maxwell had occasion to reconsider the whole question of what law was in force in these Settlements, and in a most elaborate judgment, whilst agreeing with Sir Benjamin Malkin’s view, that the law of England was that introduced by the Charters into these Settlements, held that the exceptions and indulgences in favor of the manners and customs of foreign races, locating themselves here, were not to be determined by an unregulated application of the language creating such exceptions as the Court in its discretion might seem fit, but by those principles and rules of the law of England, applicable to possessions such as these; and that, under English law, the necessary modifications in favor of the natives of these Settlements could be met by the application of the law of Comity to foreigners commorant in British territories, and that, under this principle of Jurisprudence, no modification such as would so fundamentally alter the English law of Inheritance as to admit adopted children as objects of succession could be made. The principle of “Comity,” or as some writers have perhaps too hastily called it “Private International Law,” was held by Sir Benson Maxwell, as I understand his able and elaborate judgment, to govern the ‘admissible circumstances’ under which the inhabitants of these Settlements were to have the benefit of modifications of English law, in favor of their own habits and usages, and the words of the Charter, if of any effect, were but confirmatory of

[a] Magistrates’ Appeals, Vol. III. of these Reports.

this customary legal concession. The principles of this decision were again applied by the same learned Judge, in the case of *Choa Choon Neoh v. Spottiswoode* [Woods' Oriental Cases] [a] where determining the effect of a gift by a Chinese for the performance of "Sin Chew" ceremonies, the learned Judge holding it to be void, as infringing the law against perpetuities. So much of his decision, as pronounced the law of England to be in force in this Colony, and declared the degree in which in cases of the kind, regard should be had to the habits and usages of the various people residing in it, to be correctly stated, has been expressly confirmed by the Privy Council in the case of *Ong Cheng Neo v. Yeap Cheah Neo & ors.* [6 L. R. P. C. p. 38], [b] but whether modifications in favor of the habits and usages of foreign races dwelling here are to flow from the express provisions to that end in the Charter itself, or to follow as the sequence of the introduction of English law under the principle of Comity, as laid down in *Regina v. Willans*, was not a question directly before their Lordships, and I gather from the language of their judgment [p. 393] that their Lordships considered such modifications might not only flow from the language of the Charter, but even a third source, viz., that principle of law which attached to subjects of the British Crown settling in a new country such modifications in the law of their original domicile as the circumstances of the place required. The application of this latter principle would certainly meet with some difficulties having regard to the actual circumstances under which our present population has found its way here, but they say:—

"With reference to this history, it is really immaterial to consider whether Prince of Wales' Island, or, as it is now called, Penang, should be regarded as ceded or newly settled territory, for there is no trace of any laws having been established there, before it was acquired by the *East India Company*. In either view, the law of *England* must be taken to be the governing law, so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances. This would be the case in a country newly settled by subjects of the British Crown; and, in their Lordships' view, the Charters referred to, if they are to be regarded as having introduced the law of *England* into the Colony, contain in the words, 'as far as circumstances will admit,' the same qualification."

It is to be observed that from whatever source the modifications of English Law in favor of native usages and customs come, they do not reach us in a compact body of very well ascertained rules and decisions. The words "as far as circumstances will admit," necessarily leave some scope for the discretion of a Court in the application of English Law to the ever varied circumstances of new Settlements, and even the application of the principle of comity fails as a guide, immediately we have to travel off a few well beaten tracts. The fabric of International Comity, or private international law, seems to me to have but comparatively few stones of its foundation yet laid, and in the

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[b] ante p. 326.

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absence of Statute Law on the subject—which, until greater exigencies arise from the intercourse of nations and the mixture of races, than any now existing we can hardly expect, —must, it seems to me, even with this available source as a guide, be left to the discretion of the various Courts, who may have to determine the extent of modifications in favor of the customs and usages of natives settling within their jurisdiction. Modifications made in the case of a numerous race inhabiting Settlements such as these, might well be refused to two or three of their number domiciled in London. Sir Robert Phillimore in his work upon International law [Vol. IV., p. 11,] even says of it:—"It is a matter for rejoicing that it has escaped the procrustean treatment of positive legislation, and has been allowed to grow to its fair proportions under the influence of that science, which works out of conscience, reason and experience, the great problem of Law in Civil Justice."

The temptation to adopt the more clearly defined principle of Jurisprudence, applied by Sir B. Maxwell in *Regina v. Willans*, is a natural one, but, attentively as I have considered that very able judgment, I am yet not satisfied that under the principle of Comity, it is possible to range all the modifications that might be required to meet the circumstances of these Settlements. The principle, however, of attentively regarding what modifications the law of England has refused to make in favor of the foreigner, seems to me of the soundest and the best of all restraints upon a really irregular application of that discretion which Sir Benson Maxwell condemned. By common consent, independent nations have determined that Comity disregards all Foreign law, whether in the garb of religion, usage, or otherwise, in respect of heirship or succession to immoveable property, and although the peculiar circumstances of these Settlements have let in the case of other than the 1st wife of Mahomedans to a departure from this principle, or, to quote the language of Sir Benson Maxwell in *Regina v. Willans*—to, perhaps, the "stretching beyond its legitimate limits a well established principle,"—I think that principle so sound a one, and well settled that a strong case of injustice or oppression should be shown, before a Court should decline to have its discretion guided by it. But whether or not injustice or oppression of sufficient gravity to lead to this exception in favor of a Mahomedan's second or other wives, has been made out, the practice of allowing them to share in the husband's estate, is too well established to be now shaken. But that a case of such injustice, or oppression, can be made out in the case of the custom of adoption, which would counterbalance the weight and soundness of that policy, which is embodied in the rule of English law which would exclude such a custom amongst its laws of inheritance, I do not think. The introduction or the custom would be to add one more to the many conflict of laws which in Settlements composed of so many diverse races, are continually arising; to introduce a principle, still further foreign to those general laws of succession which prevail in them; and, as far as I can see, without any potent counterbalancing advantage. The custom is also one of Chinese law, in

respect of which, we are imperfectly acquainted with, and have not the means of more perfectly ascertaining. It is in itself highly undesirable to multiply laws of inheritance in any country, but, perhaps, more especially over small Settlements such as these. That uniformity in such a matter, contributes to the diffusion of a knowledge of, and certainty in, the law itself, is also of the greatest advantage.

For these reasons and fortified by those decisions which have determined that laws affecting succession to immoveable property, are of general, and not merely local policy, and are not adapted to the conditions and wants of races similarly placed to those here, I am of opinion it is my duty to follow the decision of Sir Benson Maxwell rather than those of his predecessors. Neither do I see sufficient reason to depart from this view in this case, because the claim is to personal or moveable and not immoveable property. I should have some difficulty, perhaps, were I to limit myself only by the somewhat unsettled obligations of Comity as to the rights of foreigners commorant in purely personal estate, but calling to the aid of the Court that discretionary power which, it seems to me, it must sometimes exercise upon grounds of policy, and which is fully accorded to it, both under the words of the Charters introducing English Law into these Settlements and under the general principle of English Law by which its provisions have effect in these Settlements, "as far as circumstances admit," I think, I am correct in coming to a similar conclusion in the matter of personal estate. The circumstances of inconvenience or injustice in declining to recognise this practice of adoption, do not seem to me sufficiently grave to call for the modification of English Law, as sought. Indeed with an absolute testamentary power, and that full knowledge of the terms under which Chinese settle in this Colony, which this and previous decisions may be supposed to give, it will be hard to make out much semblance of their existence.

The demurrer must be allowed.

CURRIER v. LEE PEE CHUAN & ORS.

If a Bill of sale refers to a list of the articles assigned, but no copy of the list is registered along with the copy of the bill of sale under the Ordinance 22 of 1870, Section 18, the registration and bill of sale are void against an execution creditor.

The object of the Ordinance 22 of 1870, section 18 *et seq.* is the same as the English bills of sale Act.

This was an interpleader. The defendants herein, the execution creditors, had obtained judgment against one Matthew McIntyre, and had seized certain household and office furniture and other goods belonging to him. Prior to the judgment and seizure, the said Matthew McIntyre had executed a bill of sale, by way of mortgage, of the said furniture and goods to the claimant herein, to secure a sum of \$3,000, due by him to the claimant. The bill of sale referred to a list of the articles mortgaged, and to the original bill of sale a list was attached. A copy of this bill of

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sale had been registered under the Ordinance 22 of 1870, section 18, in the Registry of the Supreme Court, with the usual affidavit; but no copy of such list was filed along with the copy of the bill of sale. The list referred to property seized by the execution creditors.

Thomas, for the execution creditors, contended, that the bill of sale was void, as a copy of the list referred to in the bill of sale had not been filed. The Ordinance 22 of 1870, section 18, required that any schedule or list referred to by the bill should be registered, whether the same was annexed as part thereof or not.

Van Someren, for the claimant, contended that the Ordinance 22 of 1870, section 18, was not so stringent, and severe as the Bills of sale Act at home, as it omitted the words "null and void to all intents and purposes." These words being omitted in the Ordinance, the bill of sale was merely irregular, and the omission, an oversight, but could easily be put to rights by annexing a copy, as the original existed, and as the omission did not prejudice the execution creditors. The Ordinance also contained no preamble like the English Act, which distinctly tells one the object and reason of its being passed. That object was evidently not the object of the Ordinance, as the preamble is omitted, and the words referred to, also omitted. *Miller & Collier on Bills of Sale*, [3rd ed.] pp. 26, 27, 28.

Wood, J. I am of opinion that the bill of sale referring to a list of articles, a copy of which was not registered, the registration was void, and the bill of sale also. I consider that the object of the Legislature, although not expressed in a preamble as in the Imperial Act, was to protect the general body of creditors, and that it is incumbent upon a person who takes a bill of sale from another, to obey the requirements of the Act, which states that he is to register "the lists referred to," in the bill of sale, and that failing to do so, the omissions against the spirit, and letter of the Ordinance 22 of 1870, section 18. The judgment must be for the execution creditors.

VEITCH v. DE MORNAY.

PENANG.

WOOD, J.,
1878.

January 28.

A declaration that the plaintiff was the Colonial Surgeon of this Settlement, and as such had charge of and was responsible for the good management, order and conduct of the General Hospital at Penang and the Hospital at Butterworth, Province Wellesley, and for the proper medical treatment of the patients therein, and that the defendant, with intent to injure the plaintiff, falsely and maliciously spoke and published of the plaintiff, in relation to the General Hospital, the words following:—"It stunk; it stunk," and averring in an innuendo, that the defendant thereby meant that the General Hospital was so badly and negligently managed and conducted under the plaintiff, that the Hospital stunk, whereby the plaintiff was injured in his reputation as a medical man, and in his office of Colonial Surgeon in charge of the Hospital—and with the like intent, also falsely and maliciously spoke and published of the plaintiff in relation to the Hospital at Butterworth, the words following: "People are sent in curable, and sent out incurable," and averring in an innuendo, that the defendant thereby meant that patients were sent to that Hospital curable, but owing to the negligence and unskilful treatment they received there, they were sent out incurable, whereby the plaintiff was injured as before—sufficiently avers that the words spoken, were spoken of the plaintiff; and not, as a matter distinct from any direct imputation of blame attaching to him.

The above words were spoken by the defendant in the presence of the plaintiff, and several other gentlemen, in reference to the general state of and matters connected with these public Hospitals: no express reference was made to the plaintiff therein.

Held, the communication was privileged, and in the absence of actual malice, an action did not lie therefor.

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This was an action of slander. The declaration in the first count stated, that at the time of the committing of the grievances hereinafter mentioned, the plaintiff was in the service of the Colonial Government of the Straits Settlements, as Colonial Surgeon and Senior Medical Officer in charge of the Government Hospitals in Penang and Province Wellesley, and, as such, was responsible for the good management, order and conduct of the said Hospitals, and the defendant falsely and maliciously spoke and published of the plaintiff, in relation to the Government General Hospital in Penang aforesaid, the words following, "It stunk, it stunk," meaning thereby that the said Government General Hospital was so badly and negligently managed and conducted under the plaintiff's superintendence, that the said Hospital stunk: whereby the plaintiff was injured in his credit and reputation as a medical man, and in his said Office of Colonial Surgeon and Senior Medical Officer, in charge of the said Hospitals.

The second count began as the first and continued, "and as such was responsible for the good management, order and conduct of the said Hospitals, and the proper medical treatment of the patients therein, and defendant falsely, &c., spoke, &c., of the plaintiff, in relation to the Government Hospital at Butterworth, the words, &c.: "People are sent in curable, and sent out incurable," meaning thereby that patients are sent into Butterworth Hospital curable, but owing to the negligence and unskillful treatment they receive there, they are sent out incurable, whereby the plaintiff was injured, &c.," as before.

The defendant demurred to this declaration, on the ground that it did not disclose a sufficient right of action in the plaintiff to maintain this action. The plaintiff joined in demurrer.

Clarke, for the demurrer. Neither of the counts shew a sufficient cause of action. The words themselves are not defamatory, and do not refer in terms to the plaintiff, either expressly or impliedly. There must always be an averment of the manner in which the words spoken, as connected with the person alleged to be slandered. *Solomon v. Lawson*, 15 L. J. Q. B. [N. S.] 253.

Ross, for the declaration, was not called on.

Wood, J. The question is whether the declaration sufficiently avers that the words spoken, were spoken of the plaintiff, and not of the conduct of the Hospitals, as a matter distinct from any direct imputation of blame attaching to him. The words impute mismanagement and negligence: they do not in themselves refer to the plaintiff, but the declaration states they were spoken of him. Whether they did, or did not, is a matter of enquiry; but on this declaration, it must be taken to be sufficiently averred that they did. The demurrer will be overruled.

Demurrer overruled.

29th January, 1878. The case was now gone into on its

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merita. The defendant pleaded not guilty, and also admitted that the words were spoken, but denied the meaning assigned to them, and averred the truth of same. It appeared from the evidence that the words were spoken by the defendant in the presence of the plaintiff, in a general conversation among several gentlemen, at the George Town Club, in reference to the general state of the Hospitals. No express reference was made to the plaintiff in this conversation, although it imputed blame somewhere. The plaintiff considered these remarks reflected on him, and in answer to a question put during the trial, said, that he held himself responsible, as medical officer having them in charge for the proper conduct of the Hospitals. On the conclusion of the plaintiff's case,

Clarke, for defendant, moved for a non-suit, on the grounds that the communication was privileged, as being a matter of public interest commented on, and there was no proof of actual malice beyond that implied from the falseness of the words spoken. *Howard v. Harrison*, 7 L. R. C. P. 606, also that the statement was not directed towards the plaintiff nor necessarily affected him.

Ross, for plaintiff, submitted that the allegations in the declaration were proved, and this was not a privileged communication. *Davies v. Duncan*, 9 L. R. C. P. 396; *Dixon v. Hilliard*, 9 L. R. Ex. 879.

Wood, J. As was obvious from the opening of the case, the plaintiff has failed to shew actual malice on the part of the defendant towards the plaintiff, nor has it been shewn that the words used referred to the plaintiff personally—nor—if indeed, such a proposition was capable of proof—that the plaintiff was responsible for any misconduct in the public hospitals, of which he was not himself guilty. But irrespective of the question of truth, the plaintiff's case shewed that the statements complained of were such as the law of England considers a privileged communication. They were free statements concerning a public institution, made by one of the public, to a person who had a direct interest in the matter, among other persons having also a general interest in the subject. Such freedom of discussion—the freest discussion of public institutions—and it might be said of public characters, and the officers of the Crown in connection with these institutions—imputing though they might, blame on the individual, or the institution in question, if free from personal malicious feeling—were—as being consistent with the well-known privileges and liberty of the subject—not actionable at law. There will therefore, be a non-suit in this case.

Non-suit.

**SALMAH AND FATIMAH, INFANTS, BY THEIR NEXT
FRIEND SHAIK OMAR v. SOOLONG.**

A Shafi female who has arrived at puberty, may lawfully renounce the tenets of that sect, and embrace those of the Hanifa. SINGAPORE.

According to the Hanifa sect, a girl who has arrived at puberty, is legally emancipated from all guardianship, and is at liberty to marry whom she chooses, whether her equal or otherwise. SIDGREAVES, C. J., 1878.

An Arab Shafi female, having arrived at puberty, was desirous of marrying a Kling Mohamedan; her Guardian or Wali, refused to consent to the marriage, on the ground, that she being an Arab, and so considered of a superior caste, could not marry any person other than of her own nationality. The girl went through the ceremony of marriage with the man, without her guardian's consent, and the guardian obtained an injunction from this Court restraining the consummation of the marriage. On a first motion to dissolve the injunction, the Court refused to do so, the girl being then still a Shafi, according to which sect a virgin could not contract marriage at any age, without her guardian's consent. The girl then renounced the tenets of the Shafi sect, and embraced those of the Hanifa, and then renewed her application. February, 26.

Held, that her change of sects was valid; and, as a Hanifa, she being of the age of puberty, was emancipated from all guardianship, and at liberty to marry whom she chose, and the injunction was dissolved with costs.

Mahomed Ibrahim v. Gulam Ahmad, 1 Bom. II. C. Rep. 239, followed.

This was a suit by the next friend of the above-named infants, in their names as plaintiffs, against the defendant, their mother, for an injunction restraining the consummation of an alleged marriage between the second named infant plaintiff, with one Ismail, a Kling Mahomedan. An interim injunction had been granted, and the mother moved for its dissolution, which was refused. New circumstances having thereafter arisen, a second motion was made for that purpose, which is the one reported. The facts giving rise to the motion, and the nature of the affidavits and evidence in the case, sufficiently appear in the judgment. It is only necessary to add, that the infants appeared to be merely nominally plaintiffs, their uncle, the next friend, being really the plaintiff—there was no reason, however, to doubt the *bona fides* of his proceedings.

Bond [*Dunlop*, with him] for defendant in support of the motion.

Donaldson, for plaintiffs [the next friend] opposed it.

Cur. Adv. Vult.

On this day, judgment was delivered by

Sidgreaves, C. J. This was a motion to dissolve an injunction originally granted on the 4th April, restraining the consummation of a marriage between one Fatimah and Ismail, without the consent of the Court, on grounds declared upon affidavit. The matter was subsequently argued before me in Court, on a motion to dissolve the injunction, but the motion was refused on the grounds then stated, in a written judgment which I delivered. The present motion came on upon further affidavits that the girl Fatimah had renounced the Shafi, and adopted the tenets of the Hanifa sect, and also of Dr. Rowell, that she was apparently of the age of 17 years, and quite marriageable. The motion to dismiss the injunction was resisted on the ground that the proposed marriage was not an equal one, and that inasmuch as Fatimah was the daughter

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of an Arab father, although of a Malay mother, and that Ismail was a Mohamedan Kling, the marriage was not a valid one without the consent of the Wali or Guardian of the girl, who in this instance, is Shaik Omar, the paternal uncle of Fatimah, and refuses to give his consent to it. The question of equality was argued before me, and although considering the necessitous circumstances of the girl, the marriage would, in every other respect, be advantageous to her, yet in point of caste, she being the daughter of an Arab father, would be considered as superior to Ismail, her intended husband. The circumstances of the girl Fatimah and the relations which her guardian has hitherto had towards her, appear from the affidavit of Soolong, mother of Fatimah:—

"I the said Soolong for myself say, I am a Malay, and was married about twenty years ago to one Shaik Allie bin Awal Thalap, by whom I had three daughters, born during the first three years subsequent to my marriage, namely Zannah, who is since dead, and Salmah and Fatimah, the plaintiffs above-named.

"2. My husband, the said Shaik Allie, died about three years after the birth of my youngest daughter, the above-named Fatimah, leaving me in such a state of penury, that I was obliged to apply to relations and friends for assistance to enable me to defray the expenses of his funeral.

"3. After the death of my husband, the said Shaik Allie, I went into service as a nurse in different families and supported my children by my earnings until my sister Mandak, wife of one Mohamed Mustan, took them to live with her. This was about four years after my husband's death, and my children, the plaintiffs above-named, have from that time lived with the said Mandak, and been maintained entirely at the cost of the said Mohamed Mustan down to the time of his death, which happened about seventeen months ago, and since then at the cost of the said Mandak.

"4. I have, since the death of the said Shaik Allie, been twice married, and am now the wife of one Mohamed Imbee, but the circumstances of neither of my husbands were sufficiently affluent, to enable me to support my daughters, the plaintiffs, besides the children of which, I am the mother by my subsequent husband.

"5. The affidavit of Shaik Omar bin Sahlaf, filed in this cause, has been translated and explained to me, and I deny the statement made in the second paragraph of the said affidavit, that the plaintiffs and myself have since the death of the said Shaik Allie, been mainly supported by the said Shaik Omar. From the date of my husband, the said Shaik Allie's death, the said Shaik Omar has not in any way, contributed to my support, and to the best of my information and belief, all that the said Shaik Omar has ever done for my daughters, the plaintiffs, was to make them a present of a Sarong and twenty-five cents apiece, and I further say that the plaintiffs, my daughters are not, to be best of my information and belief, possessed of household property situate at Campong Glam or elsewhere, or of any property whatsoever.

"6. The said Shaik Omar, with the exception of one visit which he made about five years ago, has been continuously absent from Singapore for upwards of ten years. On the occasion of his last visit to Singapore, he wished to take my daughters, the plaintiffs, with him to Batavia, but they refused to leave Singapore. The said Shaik Omar is not a pure Arab. He was born in Singapore and his mother was a native of Kotah in Sumatra."

Fatimah appeared in the witness-box and stated that she contracted the marriage with Ismail at her own wish, and that it was her wish that he should be her husband.

It does not appear from any of the affidavits put in by those who are opposing the marriage, nor from any evidence adduced in Court, what is to become of this girl in case of opposition to the

marriage being successful. Apparently, she is to remain unmarried and indigent for the rest of her life, unless she abandons her present lover with whom she has already gone through the ceremony of marriage, and marries an Arab, inasmuch as all others are said to be forbidden her.

In my previous judgment, I referred to the case of *Mohamed Ibrahim v. Gulam Ahmed*, [1 Bombay High Court Reports] as illustrating at pp. 239, 240, the distinction between the Shafi and the Hanifa sects, and the difference of the law relating to their marriage contracts.

It is contended, however, that although the girl is now a member of the Hanifa sect, and has arrived at nubile years, she is unable to contract a marriage without the consent of her guardian. The principal authority upon this point was Syed Mohamed bin Shaik bin Sahil, Mufti of Johore, who made two affidavits to the following effect:—

4. I am thoroughly conversant with the Mohamedan Law of Marriage, having been educated in the Mohamedan Law at Hydermsut in Arabia, and have been for the last six years and upwards, Mufti or Mohamedan Judge of Johore.

5. According to the Mohamedan Law, the Wali of Mohamedan female would, [the father and grandfather being dead, and there being no elder brother of full age] be the paternal uncle, and no valid marriage of such female can be contracted without the presence and consent of her Wali, but if the Wali were resident in another country, twenty-four hours' journey by foot or forty-five miles by sea, the Kazi or Judge, if duly appointed as such by the Government of the country and not otherwise, might act as Wali. There is no Kazi in the Straits Settlements, and the pretended marriage contracted between the plaintiff Fatimah and the said Ismail, in the absence of her Wali as set forth by the deponent, Shaik Omar, is null and void,

6. According to the Mohamedan law, an Arab female cannot intermarry with a Mohamedan of any other nation, without the consent of her Wali, whether he is in the country or absent, and, if absent, his written consent must be obtained, and for this reason also, the pretended marriage of the plaintiff, Fatimah, is invalid.

In his second affidavit made on the 7th day of August, 1877, after Fatimah had renounced the Shafi, and joined the Hanifa sect, he says:—

I agree that a Shafi woman, after attaining puberty can, with the consent of the Kazi of the country, for a reason, but not otherwise, enter the Hanifa sect, and that the legality of her subsequent marriage will be determined by that law, and I agree also that a virgin, after "attaining puberty, can contract a valid marriage without the consent of her father or guardian, subject only to this condition, that it be what is known as Koofoo or equal, but neither by the Shafi nor Hanifa Law can a virgin contract a valid marriage that is not "Koofoo," without the consent of her parent or guardian, and if that parent or guardian has been absent, and the marriage contracted by the Kali as Wali, the parent or guardian has the power to separate the parties on his return until there has been issue of the marriage."

"According to both Shafi and Hanifa, an Arab woman is not "Koofoo" with an "Ajab" which includes both Klings and Malays, and accordingly no marriage between the plaintiff Fatimah and Ismail can be valid, without the consent of the Wali or Guardian of the said Fatimah who, in this case, is Shaik Omar bin Awath bin Thabah, her father's brother."

"I cite as my authority for the statements of Muhomedan Law above given, the "Aldorul-Muktar," of Imam Hanifa, the great authority of the

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SIDGGRIVES, "Hanifa sect, at the chapter in "Wali" p. p. 458-9 and 498, which I now produce for the information of this Honorable Court."

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Now the principles of Mahomedan Law as stated here, do not appear to me to agree with those laid down in the case above referred to, nor with those of the leading writer upon the principles of Mahomedan Law.

In Hamilton Hidayat, Vol. 1, p. 95, the chapter on "Guardian-ship and Equality," commences thus:—

"A woman who is an adult, and of sound mind, may be married by virtue of her consent, although the contract may not have been made or acceded to by her guardian; and this, whether she be a virgin or a Siyeeba. This is the opinion of Haneefa and Aboo Yoosoof as appears in Tahir Rawayet. It is recorded from Aboo Yoosoof, that her marriage cannot be contracted except through her guardian. Mohamed holds that the marriage may be contracted, but yet its validity is suspended upon the guardian's consent; on the other hand Malik and Shafee assert that a woman, can, by no means, contract herself in marriage to a man in any circumstance, whether *with or without* the consent of her guardians, neither is she competent to contract her daughter or her slave, not to act as a matrimonial agent for any one, so as to enter into a contract of marriage on behalf of her constituent; because the end proposed in marriage, is the acquisition of those benefits which it produces, such as procreation, and so forth; and if the performance of this contract were in any respect, committed to *women*, its end might be defeated, they being of weak reason, and open to flattery and deceit. Mohamed argues that this apprehension is done away by the permission of the guardian, being made a requisite condition. The reasoning upon which the Tahir Rawayet proceeds in this case is that, in marrying, the woman has performed an act affecting *herself only* and to this she is fully competent, as being *one* and adult and capable of distinguishing *good from evil*, whence it is that she is by law capacitated, to act for herself in all matters of property and likewise to choose a husband; neither does a woman require her guardian to match her for any other reason than as she may, by that means, avoid the imputation which might be thrown upon her modesty if she were to perform this herself, for all which reasons, a woman, contracting herself in marriage is valid, independent of her guardian, although it should be an unequal match; but yet, in the latter case, the guardian is at liberty to dissolve the marriage. It is recorded as an opinion of Haneefa and Aboo Yoosoof, that the marriage is illegal if there be an inequality between the parties. It is also recorded that Mohamed, afterwards adopted the sentiments of the two elders upon this point, and agreed with them, that the marriage here treated of, is lawful, and that its validity is not suspended upon the approbation of the guardian."

Now amid a good deal that is confusing and perplexing in this paragraph, I think we may deduce from it that Mohamed finally adopted the opinions of Hanifa and Aboo Yoosoof as enunciated in the opening of the Chapter that; "A woman who is an adult and of sound mind may be married by virtue of her own consent, although the contract may not have been made or acceded to by her guardian."

In Macnaghten's *Principles of Mohomedan Law*, it is laid down at p. 64: "The marriage of a free adult and discrete damsel with a man equal in condition of life, is good and valid, without the permission of her guardian, but the guardian may object if there be not equality between the parties." At p. 268, however, he says; "According to the Nigaya, the marriage of a free-woman possessing mature judgment is valid without the consent of a

"guardian, although contracted with one not equal in point of condition." And then in a note he refers to a previous case to show that this is not correct. To Baillies' Digest I have already referred in my previous judgment.

In a work on the Mahomedan Law published in 1873, by Shama Churun Sircar, the Tagore Professor of Law, appointed by the Calcutta University, the principles of which he says, in the preface, have been deduced from the Hedaya and the Fatawa-i Alamgiri, and occasionally from Hark-ul-Vikayah-Jami-ur-Raumg and other works of great weight, authority is to be found for the support of either proposition contended for. In his Treatise on guardianship in marriage, at p. 334, he says :—If a female on attaining puberty, "contracts herself in marriage without the consent of her guardian, and the match be unequal, her guardian has a right to object with a view to set the marriage aside."

And he refers to Macnaghten in a note as an authority for that proposition. At p. 320, however, at the commencement of the same Chapter, he says : "[a] The marriage of a free and adult woman [contracted] without [the interference of] a guardian is valid even though the match be unequal, and though the guardian may make an objection with respect to the latter. By the mention of a free and adult woman, it is intended that marriages of minors, and slaves are not valid; for it is agreed by all, that guardians are necessary for the validity of their marriages." [Shark-ul-Vikayah with Chalpi, Vol. II, p. 332.]

This work is quoted as an authority in the Bengal Law Reports, High Court, Vol. XIII, p. 162, and at p. 300 in his Chapter on marriage, I find the following: "Except *Islam*" and freedom, "equality in any other respect is not invariably observed in Ajam or in a country other than Arabia."

I have referred to all the translations that have been put in, but I have failed to deduce any more satisfactory conclusion from them than from the text books.

The case, however, to which I have already referred, *Mahomed Ibrahim v. Gulam Ahmad*, seems to me to explain the difficulty which one meets with in referring to these different authorities. It is impossible to lay down any general proposition which shall be true of the different Mohamedan sects, inasmuch as the law and the custom which apply to the one do not apply to the other. The learned Judges who decided that case must have had ready access to all the authorities bearing upon the subject, and the result of it is embodied in one short paragraph at p. 239.

"Hanifa and Shafi are the most celebrated of the four schools into which orthodox Mohamedans are divided. They are considered by each other to be equally orthodox in a spiritual sense, the differences between them relating only to their expositions of temporal law, as deduced from the Koran and other sources to which orthodox Mohamedans refer for their religious tenets. The respective followers or disciples of Hanifa and Shafi, under the denomination of Hanifites and Shafites, profess to be governed in their temporal affairs by the opinion of those founders of their sect or school, and the acts of these followers are, accordingly, treated as lawful or the contrary. For the purpose of this case it is only necessary to refer to

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SIDGREAVES, "one point of difference. The Hanifites hold that a girl who arrives at
C. J. "puberty, without having been married by her father or guardian, is then legally
— "emancipated from all guardianship, and can select a husband without re-
1878. "ference to his wishes. The Shafites, on the other hand, hold that a virgin,
SALMAH "whether before or after puberty, cannot give herself in marriage without the
& ANOR. "consent of her father. The effect of a lawful change from the sect of Shafi
v. "to that of Hanifa, would be to emancipate the girl, who had arrived at
SOOLONG. "puberty, from the control of her father, and to enable her to marry without
"consulting his wishes or obtaining his consent."

Now the words used here "legally emancipated from *all* "guardianship and can select a husband without reference to his "wishes" are very strong, and, it appears to me, that I should be acting in direct contravention of this decision, if I held that, on the ground of inequality, this girl Fatimah was still subject to her guardian, and that she could not select a husband without reference to his wishes. I have no doubt that she has arrived at a marriageable age, and I find on the authority of the case above referred to, that her change from the Shafi to the Hanifa sect, was a perfectly valid one. In accordance therefore, with what have been held to be the tenets of the Mohamedan law relating to marriage contracted by persons belonging to the Hanifa sect, I find that the girl Fatimah is now legally emancipated from all guardianship, and that she can select a husband without reference to his wishes, and the injunction restraining her from doing so, is now dissolved with costs.

In re SHERIFF OF PENANG.

PENANG. It is a rule of construction, of a Statute or Ordinance, that the provisions therein, cannot refer to powers and authorities not in *esse*, at time of its coming into operation.
WOOD, J. Therefore, although by the Courts Ordinance 5 of 1873, the Sheriff is empowered and required to execute *all* warrants and process of the Court, yet, as he was neither empowered nor required thereby to execute distress warrants, he could not be required to execute such warrants, issued under the Distress Ordinance of 1876, in which latter Ordinance, he is not specially named as an officer.
MARCH 12.

The Sheriff is not a "bailiff or other officer," within the meaning of the Distress Ordinance.

This was a rule obtained by Mr. H. C. Vaughan, Deputy-Registrar of the Court, calling on Mr. J. B. D. Rodyk, Sheriff of Penang, to shew cause why he refused to execute a distress warrant, issued by the Deputy-Registrar, under the provisions of the Distress Ordinance 14 of 1876.

Van Someren, showed cause on behalf of the Sheriff.

H. C. Vaughan supported the rule.

Wood, J. In this case, on behalf of the Sheriff, it is urged, that on a fair construction of the Distress Ordinance of 1876, it must be concluded, that although the distress was to be executed by the "bailiffs and officers" of the Court—"officers," meant officers other than the Sheriff. In this view I concur. Although by the Ordinance of 1873, the Court may require the Sheriff to execute

writs, warrants, orders, &c., yet I consider that this provision has reference to warrants and orders, &c., which the Court might then, at the time of the passing of the Ordinance, make; but did not, and could not, in accordance with a well-known rule of construction, refer to powers and authorities, not then *in esse*. WOOD, J.
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I consider the point to turn on the construction of the Distress Ordinance of 1876, and seeing that the Sheriff was not only not named in the Ordinance, as an officer thereunder, but, in section 12, cl. 2, and section 23, is clearly distinguished from "bailiffs and other officers"—and looking also at the dignity of the Office, I hold that the Ordinance of 1876, did not contemplate the employment of the Sheriff personally in the carrying out of a distress, and decide in his favour.

Rule discharged.

S. A. VAN SOMEREN *v.* BOON TEK & CO.

A person who knows a parcel contains a particular kind of articles, which are of appreciable value, but, on asking its value, is not told same, but who nevertheless accepts, without reward, such parcel to transmit to another, is bound to use "such care and diligence, as persons ordinarily use in their own concerns, and "such knowledge and skill they have."

His duty under such circumstances is, to return the parcel to the person who gave it to him, or keep it till he can communicate with that person, or the person to whom it is to be transmitted; but his accepting such parcel and thereafter handing it to the carrier, without taking a parcel receipt, bill of lading or other security therefor, is strong evidence of negligence, directly or proximately, resulting in the loss of such parcel, and for which he is liable. His handing it to his clerk to hand to the carrier, without telling his clerk that the parcel contained valuables, who, in consequence, did not inform the carrier thereof, is an additional element of such negligence.

This was an action to recover \$351.50, being the value of jewellery lost through the negligence of the defendants. The plaintiff was a planter in Deli, Sumatra; the defendants were general store-keepers in Penang, and, to a large extent, acted as agents for planters in Deli. The plaintiff and defendants had had large dealings with each other for several years, and the defendants had, during that time received, without charge, various things for the plaintiff, from different persons, and had sent them on to the plaintiff by the steamers running to Deli, by handing them to the super-cargo on board such steamers, with instructions to hand them to the plaintiff at Deli. No loss had heretofore occurred in the transit of such goods from the defendants' hands to the plaintiff. The jewellery in question, were ordered by the plaintiff, of one Mr. Motion, of Singapore, with instructions to hand them to the defendants at Penang. Mr. Motion accordingly sent the jewellery to the defendants, by the hands of one Mr. Campbell: the defendants received the parcel of Mr. Campbell, who told them it contained jewellery. The plaintiff also had written to the defendants to say that a parcel of jewellery would be handed them from Singapore, and he asked them to forward same on to him. The plaintiff did not communicate the value of the articles to the defendants, nor was Mr. Campbell, though asked by the defendants, able to give its value. The defendants, through a clerk of theirs, in the

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usual way, handed the parcel to the super-cargo on board the *Colonel Phayre*, with instruction to hand same to plaintiff at Deli, but took neither bill of lading nor parcel ticket, or other receipt therefor. The parcel never reached the plaintiff, and could not be traced further than up to the time, when defendants' clerk handed it to the super-cargo on board the *Colonel Phayre* as aforesaid. The plaintiff claimed the value of the parcel from the defendants, who declined to admit their liability.

Thomas, for defendants, contended that the defendants although they received the box in question with knowledge that it contained jewellery, yet as no knowledge was communicated to them of the value of the goods though asked for, they were not responsible, they having forwarded in the usual and reasonable way of business, under the circumstances, by delivering it to the super-cargo, without a bill of lading. He also contended that the super-cargo of the *Colonel Phayre* having received the things on board, the owners of that steamer were liable, and were capable of being sued, so the defendants were not the proximate cause of the loss.

Anthony, for plaintiff.

Wood, J. I am of opinion that the parcel having been delivered to defendants, and accepted by them, as bailee without reward, for the purpose of forwarding it to Deli, with a knowledge that it contained jewellery, but without any knowledge of its value, they were bound to use "such care and diligence, as persons ordinarily use in their own concerns, and such knowledge and skill as they had," and that, thereupon, they were bound to ship this parcel of unknown, though appreciable value, as goods of value are ordinarily shipped, viz., with the security of a bill of lading and not otherwise—they cannot by merely shipping it as an ordinary newspaper, because they were unable at the time to declare its value, relieve themselves of the obligation to send it in a manner which was practically safe—but bound to keep it or return it, until by communication with the consignor or consignee, they were able to send it with reasonable safety. *Beal v. South Devon Railway*, 5 H. N. 881 *et seq.*, cited in *Cogge v. Bernard*, 1 Smith L. Cases, 196. Inasmuch as there is evidence that inquiry was made after the loss, but the parcel was never traced beyond the vessel, the loss I consider, resulted directly from the direct negligence of the defendant.

It is further to be remarked that the defendants not having mentioned to their clerks, or the clerks of the ship, the fact of the case containing jewellery, is an additional element of negligence, in all probability, directly affecting the loss of the packet. There must be judgment for the plaintiff.

Judgment for the plaintiff.

AMEERAN v. CHE MEH *alias* ISMAIL.

The rule that a tenant is estopped from denying his landlord's title, applies to every case of landlord and tenant, irrespective of the character in which the landlord acts.

Therefore, where A took certain land on a monthly rental from B, both parties believing the land to be Mosque land, and B then acting as trustee of such lands; but it afterwards appeared the land was not Mosque land, but the private property of B's grandfather, whose Executor B was; and B thereupon sold the land as the private property of his grandfather,

Held, that B's assignee, C, under such sale, could recover such lands in ejectment from A, who was estopped from denying B's title as such Executor to such land, and also the title of his assignee, C.

This was an action of ejectment. The defendant had been let into possession of the land by one Hajee Abdul Cader, who was then acting as trustee of the Mahomedan Mosque, and so let the land, under the belief it was Mosque land. Subsequently he discovered the land was his grandfather's own property, of whom he was Executor. He accordingly, as Executor of his father, sold the land to one Baban Abdul Cader, whose Executor the plaintiff was. The question was whether the defendant was estopped from denying the plaintiff's title, he claiming through the defendant's original landlord, although in a totally different character.

Clarke, for the defendant, contended there was no estoppel, inasmuch as the defendant was not disputing his landlord's title, but as Executor of his grandfather, he, however, requested further time to look up the point.

Wood, J. The point of estoppel will be reserved, by consent, for further discussion. I hold, for the present, that the defendant is estopped from denying that the plaintiff has no title to the land, nor can he dispute the title of the person from whom he had the land, nor his right to determine the tenancy or re-enter. The defendant's disclaimer and setting up a contrary title, makes it not necessary to determine the tenancy—that granting that defendant contracted with the plaintiff as trustee, this position of trustee was not material, or disputable by defendant; but he must restore the land to the assignee in law of the person who leased it to him, leaving the question of the application of the proceeds to be decided by the proper tribunal.

July 26th, 1878. *Clarke*, for the defendant. Independently of the question of estoppel as between the original lessor and the original lessee,—where the lessor, not having title, except by estoppel, assigns, the lessee is not bound to surrender to the assignee of the lessor.

A trustee, and a possessor of the legal estate, as absolute owner, are different persons, and a person, although estopped as against the trustee, yet when the trustee claims, not as a trustee, but as absolute owner, the lessee is not bound to surrender, but may dispute this new and strange title—as in fact being a different title. *Hughes v. Hughes*, 15 M. & W. 703; *Philips v. Pearce*, 5 B. & C. 433; *Rennie v. Robinson*, 1 Bing 147; *Doe on D. Higginbotham v. Barton*, 11 Ad. & E. 307.

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Wood, J. I do not think that those cases apply, they being only illustrations of the right of the lessee to deny the existence or validity of the assignment of the reversion. I consider that in this case, it has been already decided that as a fact, the assignment to the plaintiff was an assignment in terms of the *locus in quo*, of which a lease had been granted and for which rent had been paid. I am still of opinion the defendant is estopped, and judgment must be for the plaintiff.

Judgment for plaintiff.

11th February, 1879. The defendant appealed against this judgment, and the appeal now came on before the Full Court of Appeal consisting of

Sidgreaves, Knt., C. J.

Ford & Wood, J. J.

The ground on which the defendant appealed was, that the ruling of the Court below to the effect that the defendant was estopped from disputing or denying the title of the plaintiff to the land in question, on the ground that the plaintiff was the Executor of the assignee of the defendant's landlord, was erroneous in point of law.

Clarke, for Appellant, reiterated his former arguments, and cited *Cole on Ejectment*, p. 219 [1857]. *Philips v. Pearce*, 5 B. & C. 433, *Rennie v. Robinson*, 1 Bing 147; *Hughes v. Hughes*, 15 M. & W. 703; and *Doe on D. Higginbotham v. Barton*, 11 Ad. & E. 307.

[Ross, for Respondent was not called on.]

Judgment was delivered by the Chief Justice, to the effect that the Court was unanimously of opinion that the Appellant was estopped, and affirmed the judgment below.

Appeal dismissed with costs.

PAKEER MAHOMED v. KHOO HOCK LEONG & ORS.

PENANG.

WOOD, J.
1878.

May 1.

A plaintiff, although he be entrusted with the prosecution of the suit for the benefit of others jointly with himself, but who is the sole plaintiff on the record, is debarred from further prosecuting the suit, if he, for valuable consideration paid him, enters into an agreement to withdraw same. Such an agreement is a valid one, and constitutes a good answer to the further prosecution of the case.

This was a suit to restrain the defendants from carrying on a Wyang, next the plaintiff's house, and so creating a noisy nuisance to the plaintiff and the other neighbours. The action was brought in the plaintiff's name, but was actually prosecuted by the neighbours, who had clubbed together for the purpose. An interim injunction had been granted.

Van Someren, for plaintiff, opened the case that this was a noisy nuisance and purposed to prove it by direct evidence, but he also opened the following facts: that plaintiff, by his agreement with the defendants, for valuable consideration, had agreed to sell

his land and withdraw the suit, and consent to a motion for a dissolution of the injunction. But that notwithstanding this agreement, plaintiff now having as he considered, just grounds for continuing the suit for the benefit of his neighbours, does so. It was suggested, with consent of both parties, that the validity of this agreement as an answer to the suit, as a preliminary point, be first tried.

Ross, for defendants, put in the agreement and formally proved it. The plaintiff was also called, he admitted the agreement, but alleged he was desirous of prosecuting the suit for the benefit of his neighbours, who had entrusted him to bring the suit, and that he had made the agreement without their advice or consent, in fact he had been induced by defendants to enter into it.

Wood, J. No further evidence being called, I am of opinion that the agreement put in is not voidable on the ground of any fraud, and that it is binding on the plaintiff, and as such is a bar to the suit and good as a defence. The bill will be dismissed, and the injunction dissolved.

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NARAINAN CHETTY *v.* ABDUL RAHMAN, *alias* KAFFREE.

A defendant being sued at law for money lent, &c., on the common money counts, pleaded that he had before the commencement of the action, sued the plaintiff in equity, for an account which included the monies sued on in the action, and such suit was still pending, and in support of his plea, produced the records of the two cases, from which it appeared that though, some of the items were the same, yet the equity suit was based on a fiduciary relationship alleged to exist between the plaintiff and defendant, and claimed peculiar relief, relating to several matters—

Held, that the two suits were not for the same cause of action, and the plea was overruled.

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May 1.

This was an action to recover a certain sum of money on the common money counts. The defendant had commenced a suit in equity against the present plaintiff, for an account of monies lent by him to defendant, and received by him from the Colonial Treasury, as well as by sale of the defendant's property, held by plaintiff on mortgage. The defendant was a Government contractor. The money lent by plaintiff, and for which this action was brought, was lent to enable defendant to carry on his contracts. The receipts shewn in plaintiff's accounts, were amounts received by him from the Treasury. The defendant pleaded in this action the pendency of the equity suit. The records in both suits were produced.

Ross, for plaintiff.

Van Someren, for defendant.

Wood, J. Looking at the records of both suits at law and in equity, no other evidence being tendered, I hold that the causes of action are not the same, but that plaintiff sues at law for a legal cause of action, while defendant sues in equity for equitable causes of action only. Plaintiff on the money counts, defendant for account, based on a fiduciary relation between plaintiff and defendant, and for certain and peculiar relief. I give judgment for the plaintiff on the plea.

TEEMAH v. MAT TOH DIN.

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May 2.

A conveyance which was executed by one person to another, on the understanding that it should not operate as such, till the purchase money therein mentioned was paid,

Held, to be only an escrow, and inoperative to convey any interest, until the money was paid—although the conveyance was, on the face of it, an out and out one, and purported to acknowledge receipt of the purchase money.

Action of detinue for title deeds. The deeds were the deeds of the defendant's land, of which she had possession, but it appeared that she had conveyed the land to the plaintiff. The defendant alleged that the purchase money had never been paid, and the conveyance was not intended to operate till then. The deed acknowledged receipt of the purchase money, but the evidence shewed it had not been paid, and the deed was not intended to operate until the money was paid.

Duke, for plaintiff.

C. W. *Rodyk*, for defendant.

Wood, J. I hold that the circumstances attending the delivery shew that the deed to the plaintiff was intended to act as an escrow: or in other words, delivery conditioned on the payment of the purchase money. I think *Gudgen v. Noble*, 8 E. & B., 986, S. C. 26 L. J. Q. B. [N. S.] 36, cited in 1 Selw., N. P. 576, is in point, and give judgment for the defendant.

Judgment for defendant.

KADER BEE & ANOR. v. KADER MUSTAN & ORS.

PENANG.

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May 2.

A gift of an estate in lands, which is attempted to be controlled by restraint against alienation, is not void in its entirety, but the restraint alone is void, and the gift will be upheld as if the restraint had never been imposed.

A testator, so far as could be gathered from the language of his Will, devised lands to trustees in trust for 60 years, to receive the income therefrom, and divide the same among his four children, but strictly restrained the trustees and beneficiaries from alienating the said lands during that period. He further provided, that on the death of any children leaving issue, such issue should take their parent's share.

Held, that the gift for 60 years and restraint on alienation was void, that the children took equitable estates in fee, free from all restrictions.

The testator directed that \$20 per year, from the aforesaid income, before the same was divided among his children as aforesaid, should be sent to his country, without specifying to whom the money was to be paid, or for what object.

Held, the gift was void, on the ground of uncertainty.

Suit to have a proper construction placed on certain clauses of the Will of one Kader Saiboo, deceased, to have the same declared void, and the property comprised therein distributed among the next of kin; for an account of the defendant's administration of the estate, and for further and other relief.

The defendants Kader Mustan and Saboor Mydeen, were executors under the Will. The plaintiff and the other defendants were the children and next-of-kin of the testator. The Will,

dated 31st July, 1875, was in Tamil, and being translated was, omitting unnecessary parts, as follows:—

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"As I have entailed them, no one can sell for the coming 60 years, the property which I acquired during the life time of my former wife, viz., one piece of land at Permatang Kuching, one at Bagan Jermal, and the third at Penang, on which I now live. I have four children, two males and two females [names here set out.] The executors will divide the income received from the said lands after paying for expenses, and after paying otherwise as herein directed, into four equal shares, and give them to the legatees, provided they are obedient to the executors. In case of married children, should they leave any children behind them, their children will also get their share: if they leave no children, the other three children will divide the income between them. During the aforesaid 60 years, and during the time of my grandsons and grand daughters, the property will be enjoyed as above; after that it will be arranged as it pleases them. Kader Mustan, the executor, will keep with him the portion belonging to the unmarried children; and when they attain their majority, and ask him for their share, he will have to give it them, after paying expenses and producing to them accounts for the same. From the aforesaid income, twenty dollars a year shall be sent to my country The said executors have power to appoint other executors in their stead. All the inmates of the house shall be obedient to Kader Mustan, the executor, and if they are disobedient, he shall act according to his own discretion. During the sixty years, even if the executors and legatees agree to sell the property, they cannot do so. The executors shall consult in all what they do, my younger brother Sayee Mallay."

The testator died in August following. The present suit was a friendly one; and the defendants submitted their interest to the Court.

Van Someren, for plaintiffs.

C. W. Rodyk, for defendants.

Cur. Adv. Vult.

October 7. *Wood, J.* In this case, I am desired by all the parties to the suit to put a construction on certain clauses in the Will of the deceased Kader Saiboo. It is contended, or I should rather say submitted, without contention, by all persons interested, that those clauses are void, and consequently that the testator is intestate as to the lands affected by such clauses, leaving them to fall into the residuary estate. I may premise, that there being no real contention in this case, but on the contrary, all parties desiring for many natural reasons, to enjoy the property free from restriction, it has devolved upon the Court to meet the arguments of the litigants, with a view to performing the simple duty of carrying into effect the Will of the testator, so far as may legally be done without regarding the convenience or inconvenience to the parties interested under such Will, and without regarding whether it be, or be not, a wise, reasonable or a politic settlement of property. With this view, I have had the whole Will before me, and as much depends upon the language and the very meaning of certain words in the Will, I have made some enquiry into the correctness and aptness of translation of some few passages in it. The Will in question, omitting introduction and irrelevant matter, and following the translation of the Will as originally made, is as follows: [Here the Will was read.] On the Will as

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thus set out, some few matters appear, which have either been, no doubt unintentionally omitted in the statement of the case, as it appeared in the pleadings, or not very aptly translated. These omissions or corrections, although not very material, yet still help to illustrate or explain the Will in some few particulars. Thus, by reference to the Will at length, it appears that Kader Mustan, one of the executors is a son of a younger brother Sayee Mallay, which Sayee Mallay, it is declared, the executors shall consult in what they do; and also, that the executors shall have power to appoint other executors in their stead, a provision which although inapplicable to executors strictly so called, is obviously directly applicable if applied, to executors acting in the character of trustees.

With reference to modification of translation, I have, by consent of the parties to the suit, submitted the Will to the present Tamil Interpreter of the Court, and as might reasonably be inferred, the words "*As I have entailed*," are erroneously translated, and the words should be "*As I have authorized*" [my executors]. This word "entailed" of very peculiar force, if applied to an English Will, has thus no special or particular force whatever.

It would also appear, that the word "executors" does not mean Executors of a Will, but rather "*persons authorized*" or "*persons empowered*," the strict word "executors" being not a faithful, but as we may apprehend under the circumstances, not an inapt translation. Having premised thus much, and in direct reference to the contention of the parties interested, that the provisions in question are void, I am of opinion that the provisions in question are not strictly speaking void, and that it would be improper to set at nought the manifest objects and intention of the testator, because some incidents attached thereto are, by the law of this Colony, impossible of application. My reasoning in this matter is shortly expressed as follows: Taking as a leading principle, the well known maxim as given in 2 *Jarman on Wills*, [Edon. 1861, p. 766,] "that when a testator's intention cannot operate to its full extent, it shall take effect as far as possible," we are naturally led to consider what are the specific objects of the provisions in question, and which of them are, consistently with acknowledged authorities, capable, and which are incapable, of being supported and permitted to take effect. As it would appear, several objects are plain enough, 1st. The limitation of a legal estate in the lands in question to the executors and trustees and their assigns. 2nd. Equitable estates in the children and their issue after them, subject to what exact limitations will be the subject of more minute enquiry hereafter. 3rd. The subordination of the *cestui que* trust to the direction of the trustees. 4th. Restraint of alienation and subordination to the discretion of the trustees for 60 years; and it may be, the lives of the children and grandchildren of the testator.

These then, being the testator's objects, I think the following conclusions may be fairly drawn:

1. That the executor's [as trustees] and their assigns take a legal estate. The expressions, "The executors will divide the

"income received from the aforesaid lands, after paying for expenses and after paying otherwise as is herein directed, in four equal parts, and give them. . . . During the 60 years, even if the executors and legatees agree to sell the land, they cannot do so," are sufficient, in accordance with well known principles of construction, to shew that the executors are intended to have the legal estate. 2. That the children are intended to take estates of some sort; but it will be better for the present to defer the consideration of this point. 3. The expressions which subject the persons beneficially interested to the control of the trustees, may raise some slight question, owing to some apparent variation of intention on the part of the testator, as to whether both executors or one alone, Kader Mustan, is to have this authority; but still there is enough in the Will to shew that both executors and Kader Mustan in particular, are to have this authority—"The executors shall divide the income and give it to the legatees provided they are obedient to the executors. All the inmates of the house shall be obedient to Kader Mustan, the executor, if they be disobedient, he shall act according to his discretion," and it may be assumed, that Kader Mustan being a nephew, and Safoor Mydeen a son and legatee, there is a presumable inference that in all matters concerning himself, the son is not to judge; though otherwise in matters in which he is not concerned. 4. The expressions which impose restraint of alienation, and subordination to the Will of the trustees, pervade the Will, and are no less the leading idea of the testator, than the ground relied on for treating this provision as affecting with invalidity the whole bequest. The testator says: "As I have authorized them, no one can sell the property for the coming 60 years. During the aforesaid 60 years, and during the time of my grandsons and granddaughters, the property will be enjoyed as above," [referring to the payment of the income to children and grandchildren]. "During the 60 years, even if the executors and legatees agree to sell the property, they cannot do so," expressions which leave no doubt as to the testator's general meaning.

Having now, so far as I can see, the leading provisions of the Will before us, and with reference to the position of the parties concerned that these provisions are void, it is proper to review the application of that rule against perpetuities and remoteness, on which they rely for establishing their position. There is little doubt of the restraint of alienation, and the postponement of absolute dominion over the property in question, contemplated by the Will in question, being void; but the error in the reasoning of the parties concerned, seems to me to be this: It is not because a provision, which is void, is involved in other provisions like an impossible factor in an algebraical expression, that the whole provision is vitiated—but the Courts have always endeavoured, within fairly defined limits, to prevent the entire failure of the testator's scheme of disposition; and where two fairly distinguishable classes of provisions are contained in the Will, one of which is void, and the other valid, the valid one shall prevail, and

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the other fail—not that both shall fail together. Thus, where lands are devised to A in fee simple, or in fee tail, a declaration or a condition that he shall not alien is void, as being inconsistent with the estate given, and the obvious intention of the testator, in favor of the legatee, prevails in part; and as it appears to me, the question specifically before me is, whether estates are conferred, which are attempted to be controlled by a void restriction against alienation, or whether the two provisions of conferring estates and restricting alienation, are so indissolubly connected, as to stand or fall together. The law upon such points as these, is always somewhat involved, and it is difficult to hit upon precise cases which are, either in point as to the facts, or lay down with sufficient precision, the exact principle which prescribes the *ratio decidendi*. But I hold it to be sound law, that wherever, in a Will, definite estates are either expressly given, or may be, by the operation of rules of construction and of law, inferred, declarations or conditions in restraint of alienation, or unfettered enjoyment may justly be held to be void, if inconsistent with the estates given, but not to affect with invalidity the grant of those estates themselves,—and more particularly, with reference to the Will in question, where equitable estates in fee tail are granted to individuals, restraint of alienation for 60 years is void, as inconsistent with the due enjoyment of such an estate tail. I have, as I said before, a difficulty in citing cases which point out with sufficient clearness, this distinction; but I apprehend, it needs but to be enounced to be considered just and sound. Nor can I find, after a somewhat lengthened examination of the authorities which illustrate the rule against perpetuities, any case which opposes the position which I have ventured to put forth as the *ratio decidendi* of this case. Thus, bearing this principle in mind, let us see how the facts of this case are capable of application, a consideration which leads us to the deferred question of the quantity and quality of the estates conferred upon the persons beneficially interested under the Will. The Will itself contains these provisions in favour of the children, and their issue: “I have four children The executor will divide the income received from the lands, after paying expenses, &c., in four equal parts, and give them to the legatees, provided they are obedient to the executors. In case of married children, should they leave any children behind them, their children will also get their share; if they have no children, the other 3 children will divide the income between them. Kader Mustan, the executor, will keep with him the portions belonging to the unmarried children. If the unmarried children attain their majority and ask him for their share, the said Kader Mustan will have to give them their share.” These are all the provisions in the Will from which we can glean the intention of the testator, as to the quantity and quality of the estates intended to be conferred on the children, and imperfect as may be the provision, we have to deal with it as best we may. Were it allowable for the Court, to mould the Will differently, to suit a guiding principle of the Will, namely, to restrict alienation and impose control to the utmost possible extent, it would pro-

bably result in a declaration of limitations of estate in common to the four children for life, with remainder to the first and other heirs of the body in tail general, with cross remainders over to the four children, and ultimate reversions in fee, to the testator's right heirs—so modified by the alternation of estates at law and in equity, as to elude the operation of the rule in Shelley's Case, and to confer upon the trustees, ample powers of control, dictation and restraint, for the lives at least of the four children. But it is manifest, that this is beyond the power of the Court; and we must be content to deal with the provisions, such as they are clearly shewn to be, by the simple use of the language used, and its obvious inferences. As to this, there appears to me but one deduction to be drawn, the effect of which is much to simplify the legal effect of the Will, at the expense no doubt, of some portion of the testator's intention. It may be doubtful whether on a fair construction of the Will, the testator's words can be inferred to confer on the four children, estates for life. I incline to the construction, I might even say they do, in my judgment, confer such estates, but, inasmuch as the estate for life is an equitable estate, and the subsequent provisions are intended also to confer equitable estates of inheritance on the heirs of the body of such children, these estates for life, by the force of the rule in Shelley's Case, merge in the estate of inheritance of the children, and confer this estate of inheritance at once upon the tenant for life. The result is a simple one: By the operation of the laws of this Colony, which make land a chattel real for purposes of devolution, the effect is to give to the children, absolute equitable interests, free from all question of entailment, and free from all subsequent remainders, and restraints of alienation or control by executors, as incidents inconsistent with such absolute interests—leaving the four children equitable tenants in common absolutely, of the land in question.

The decree will be a declaration by the Court, to the effect that under the provisions of the Will, the testator bequeaths the lands in question to the executors, absolutely in trust for the four children, as tenants in common, of undivided four parts; a decree which will, of course, be embodied in definite and technical words of limitation.

The only remaining question is, as to the gift of \$20, ordered to be sent annually to India. As to this, although possibly the gift might have been sustained, had the Court been of opinion that the proceeds of the estate could be subjected to the control of the executors for reasons which it is hardly necessary to discuss at length—yet, the executors having, as I think, no control over the proceeds in the land in question, this bequest fails for uncertainty as to the object of the gift, upon simple and well known principles of law.

WOOD, J.
1878.

KADER BEE
& ANOR.

v.
KADER MUS-
TAN & ORS.

ADOOMEH KAKAH v. LEBBY DAIN.

PENANG.

WOOD, J.
1878.

May 6.

No action can be maintained in the Supreme Court against a Kali or Mahomedan priest, for divorcing a person from his wife contrary to Mahomedan Law, as it is a matter wholly beyond the powers and jurisdiction of the Court.

This was an action to recover \$100 damages against the defendant, a Kali or Mahomedan priest, for improperly and against the Mahomedan Law, dissolving the plaintiff's marriage with his wife, and divorcing him from his wife at her request, but during his absence. The parties appeared in person. On the plaintiff's case being opened,

Wood, J. I am of opinion that this Court cannot decide this matter as being beyond its powers and jurisdiction. The plaintiff must be non-suited.

Non-suit.

SYED AWAL BIN OMAR SHATRIE v. SYED ALI BIN OMAR AL JUNIED & ORS.

SINGAPORE.

SIDGRAVES,
C. J.
1878.

June 10.

An arbitrator who had made and signed his award, ready for delivery, is *functus officio*: and any subsequent alteration he may make is merely nugatory.

An award, on a submission of all matters in difference, is no bar to the recovery of a demand, which existed as a claim at the time of the reference, but was not then a matter in difference.

Section 2 of the Limitation Act XIV. of 1852, is more extensive than section 25 of the English Act 3 & 4 William IV., c. 27, which is expressly limited to *express* trusts.

Semble. Section 2 of the Act XIV. of 1852, applies to cases of *implied* and *constructive* trusts, as well as express trusts.

An executor, who, in accordance with his testator's Will, takes possession of property which, by the Will, is devoted to certain special objects which are void in law, with the intention of so applying the property, but subsequently misappropriates the same—cannot, when he is sued, and the objects of the testator are sought to be declared illegal, and the property to be applied in payment of legacies or to the next-of-kin, plead the Statute of Limitation, although more than 12 years have elapsed, as there is an implied or constructive trust in favor of the legatee or next-of-kin, and the case falls within section 2 of the Limitation Act XIV. of 1852. Such a suit, is not a suit for a legacy, but one to compel the executor who has clothed himself with a trust, to account for breaches of trust. [a]

Phillippo v. Munnings, 2 My. & Cr., 309, followed.

Suit for the administration of the estate of one Syed Omar, deceased, brought by plaintiff as administrator of one Syed Haroon, the son of the deceased, against the defendant Syed Ali, as the surviving executor of the deceased. The other defendants were the next-of-kin of the deceased, or their legal personal representatives. The facts and arguments, which occupied several days, sufficiently appear in the judgment.

Bond, for plaintiff.

Donaldson, for defendants Syed Ali and Sherifa Fatimah.

T. Braddell, [Attorney-General] for the other defendants.

[a] See *Mustan Bee v. Shina Tomby*, *infra*, p. 580

Cur. Adv. Vult.

October 23rd. *Sidgreaves, C. J.*—This was a petition by Syed Awal bin Omar Shatrie, of Singapore, Administrator *de bonis non* of Syed Haroon bin Omar al Junied against the defendants, praying that the real and personal estate of Syed Omar, deceased, may be administered under the directions of this Court, for the direction of the Court as to the construction of the Will, and for further relief. The matters in dispute arise out of a Will made by one Syed Omar bin Ali al Junied, so far back as the 21st of September, 1852, the said Syed Omar having died in the month of November of the same year. His executors were Syed Ali bin Mohamed al Junied, cousin of the testator, and Syed Abdulla and Syed Ali, sons of the testator, and they proved the Will on the 10th January, 1853. It is alleged in the petition that Syed Ali bin Mohamed al Junied did not intermeddle with the estate of the deceased, and died in December, 1858, leaving two the last named executors him surviving. According to the petition, these two duly collected and got in the personal estate of the testator, as also divers large sums of money, on account of the said testator's immoveable estate; and the plaintiff charges that they misappropriated and converted to their own use a greater portion thereof. The petition further states that both Syed Ali and Syed Abdulla, subsequently absconded from Singapore. The defendants, by their answers, deny the appropriateness of the term absconded, but admit that they left Singapore and resided out of the jurisdiction of the Court. The said Syed Abdulla died in Arabia, on or about the month of May, 1865, having previously by Will, appointed the defendants, Syed Junied and Syed Aboobaker, to be his executors. After the death of the said Syed Abdulla, the surviving executor Syed Ali, gave a power of attorney to the executors of Syed Abdulla, to enable them to act for him in certain matters, under the Will of Syed Omar, the testator. The petition sets out the Will of the testator, and the persons described as the heirs of the testator are his wife Sherifa Alweeah, the sons, Abdulla, Ali, Haroon Junied and Aboobaker and his daughters Zena, Sherifa Fatimah, and Katijah. The petition states that the said Syed Haroon, son of the testator, survived him and duly attained his maturity, and thereafter intermarried with Sherifa Fatimah binte Ali al Junied, and by her had one child which pre-deceased him; that after the said Syed Haroon attained his maturity, the executors of the said testator paid to him, one-eighth share of the two-thirds of the residue of the testator's moveable property, in terms of the testator's said Will, and also paid to him one-eighth share of the eight-ninths of the rents of the said testator's houses and other immoveable property, mentioned in his Will as subject to certain limitations. The petition further states:—

13. That the said Syed Haroon died in the month of February, 1860, intestate, and Letters of Administration *de bonis non* of his estate and effects were, on the 31st day of May, 1876, granted by this Court to the plaintiff Syed Awal Bin Omar Shatrie, but, with the exception of dollars 1,809 and cents 40, no further share of the said rents was ever paid by the said executors to him, the said Syed Haroon or to his legal representatives.

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SYED AWAL
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17. The plaintiff charges that a share of the estate and effects of the said testator, absolutely vested in the said Syed Haroon, upon his attaining his maturity as aforesaid.

18. The plaintiff also charges that the surplus of the one-third of the testator's moveable estate amounted to dollars one hundred and twenty-eight thousand five hundred and fifty-one, and cents sixty-three and a half, and that the testator's said executors the said Syed Ali and Syed Abdulla, never invested the same as directed by the said testator, but appropriated the same to their own use, and paid no part thereof to the said Syed Haroon or to his legal representatives, and the plaintiff as such administrator as aforesaid, claims to have the share thereof to which the said Syed Haroon was entitled with interest thereon, charged against the share or shares of the testator's estate which the said executors or either of them are entitled, or that the defendant the said Syed Ali or he and the executors of the said Syed Abdulla, or either of them may be decreed to pay the same to the plaintiff.

19. The plaintiff as such administrator *de bonis non* of the estate and effects of the said Syed Haroon, deceased, claims to be entitled to a share of the testator's houses and other immoveable estate mentioned in his said Will, as subject to the respective limitations of 70 and 20 years, also to a one-eighth share of eight-ninths of the rents and profits thereof from the end of the Mahomedan year 1275, less dollars 1,809 and cents 40, paid by the said executors to the said Syed Haroon to account thereof prior to his decease.

20. The plaintiff also claims as such administrator to be entitled to a share of the surplus of the one-ninth of the rents and profits of the testator's said houses and other immoveable property directed by the testator to remain in the hands of his executors for the purposes before mentioned, which surplus in the Mahomedan year 1278 amounted to dollars 10,936 and cents 33, and was appropriated by the said executors to their own use.

21. The plaintiff as such administrator as aforesaid, also claims to be entitled to a share of the testator's land in High Street and of the several houses and buildings thereon erected, and of the surplus rents and profits thereof.

22. That the houses and other immoveable estate mentioned in the said Will, situated in High Street, as also the houses and other immoveable estate therein directed, to be subject to certain limitations for 70 years as hereinbefore mentioned, and the property by the said Will made subject to certain trusts or limitations for 20 years is, of very great value, producing as the plaintiff believes a net rental of over dollars three hundred per month.

23. That the said term of 20 years has now expired, and the plaintiff is advised and believes that the limitation of 70 years in the Will mentioned, is illegal and void, and that the property subject thereto ought to be realized and divided amongst the testator's heirs.

24. That the plaintiff is also advised and believes that the bequest of the testator's land and houses in High Street is illegal and void, and that the same ought to be realized and divided amongst the testator's heirs, *viz.*, his children.

25. The plaintiff is, however, advised and believes that in consequence of this and other questions arising upon the legality and construction of the said Will, the said properties cannot properly be sold, save under the direction of this Honorable Court.

The defendants by their pleas and answers relied upon three principal grounds of defence, *1st.*—That the plaintiff's claims were barred by an award made in 1864, and made substantially between the same parties, as those now before the Court and in respect of the same causes of action. *2ndly.*—By the Statute of Limitations, and *3rdly.*—By the laches and acquiescence of the plaintiff.

Further questions arose regarding the construction to be put upon certain portions of the Will, but inasmuch as it was conceded on both sides that the translations were imperfect, it was agreed that those questions should stand over for the present, and that the matters should be argued upon the three grounds I have above indi-

cated. I propose in the 1st place to deal with the question of the award. SIDGRAVES,
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This question depends upon certain matters that took place in 1864. In June of that year, the present plaintiff and Sherifa Fatimah binte Ali bin Mahomed al Junied, his wife, were complainants in a suit in which Syed Abdulla bin Omar al Junied was defendant, which was as follows:

SYED AWAL
BIN OMAR
SHATRIE
v.
SYED ALI BIN
OMAR AL
JUNIED &
ORS.

"In the Court of Judicature of Prince of Wales' Island, Singpoore and Malacca.

DIVISION OF SINGAPORE AND MALACCA.

On this 29th day of June, A. D. 1864.

Between Syed Awath bin Omar Shatrie
of Singapore, Merchant, and Sherifa
Fatimah binte Alley bin Mohamed
al Junied, his wife,
Complainant.

AND

Syed Abdulla bin Omar al Junied
of Singapore, Merchant.
Defendant.

Unto the Honorable
The Judges of the said Court.

The Petition of the Complainant
above-named.

Sheweth,

That on or about the day of August in the year 1858, your petitioner, the said Sherifa Fatimah binte Alley bin Mohamed al Junied was married to Syed Haroon Bin Omar al Junied, then of Singapore, Merchant, now deceased, and thereby became and was at the date of the death of the said Syed Haroon bin Omar al Junied, the lawful wife of the said Syed Haroon bin Omar al Junied.

That the said Syed Haroon bin Omar al Junied departed this life at Singapore, on or about the 26th day of February, in the year of Christ 1860, without having made any last Will or Testament, and having sundry property and effects within the Jurisdiction of this Hon'ble Court.

That the said Syed Haroon bin Omar al Junied, left no children him surviving, and his next-of-kin according to the Statutes for the distribution of the Estate of intestates were at the time of his death, and are your petitioner Sherifa Fatimah binte Alley bin Mohamed al Junied and his mother Sherifa Alweea and four brothers and three sisters, and your petitioner Sherifa Fatimah binte Alley bin Mohamed al Junied, as the widow of the said Syed Haroon bin Omar al Junied, is entitled to one-half of his personal estate and effects.

That, at the date of the death of the said deceased, your petitioner Sherifa Fatimah binte Omar bin Alley al Junied, was an infant under the age of twenty one years to wit of the age of seventeen years.

That, on the fifth day of April in the year of Christ one thousand eight hundred and sixty, the defendant obtained from this Honorable Court, Letters of Administration to the estate and effects of the said Syed Haroon bin Omar al Junied, and he thereupon entered on the administration of the said Estate and Effects.

That, on the 18th day of June, A.D. 1860, the defendant filed an Inventory of the estate and effects of the said deceased, and on the 29th day of October, A.D. 1860, he filed a supplementary Inventory, both of which Inventories, your petitioners believe and aver to be very incorrect and defective.

That, on the 24th day of July, A.D. 1861, the said defendant filed an account of his intromissions with the said Estate, shewing a balance of Spanish Dollars four thousand three hundred and fifty-one, and cents thirty, in favor

SIDGHAVER, C. J. 1878. of the said estate, and your petitioners aver and believe that the said account is very incorrect and defective, but your petitioners are unable to point out the specific inaccuracies and defects until a further account has been filed.

SYED AWAL BIN OMAR SHAYKH v. SYED ALI BIN OMAR AL JUNIED & ORS. That, on an examination of the said Inventories and accounts, it appears, there are upwards of Spanish Dollars 9,000 apparently good debts due to the said estate, and 21 pieces or parcels of land, situated in the town of Singapore, belonging to the estate, together with various other goods, chattels and effects, which have not yet been accounted for. And your petitioners believe that property and effects to the amount of at least Spanish Dollars 30,000, have not yet been accounted for.

That your petitioners have frequently desired the said defendant to file an additional account of his intromissions with the said estate, but he neglects and refuses to do so, and your petitioners verily believe that the said defendant is using the monies belonging to the said estate in his trade or business of a merchant.

That neither your petitioners nor either of them have or has received any payment or advantage from the said estate, although the defendant obtained his Letters of Administration upwards of four years ago.

Your petitioners, therefore, pray to have the assets of the said Syed Haroon bin Omar al Junied, administered in this Court, to have their costs of suit, and for that purpose that all proper directions may be given and accounts taken, and that your petitioners may have such other or further relief in the premises as to your Lordships may seem fit, and that justice may be done as the case shall require, and further that the usual process of this Honourable Court may be issued against the said defendant, commanding the said defendant to appear in this Honourable Court, and answer in the premises, so that justice may be done as the case shall require, and to Lordships shall seem meet."

The defendant put in an answer to this petition in July of the same year, admitting that, on the 5th day of April, 1860, he obtained a grant of Letters of Administration to the estate and effects of the said Syed Haroon, and thereafter acted in the administration of the said estate and effects—along with his answer he filed certain accounts, the first being headed "Sherifa Fatimah binte Ali bin Mahomed al Junied, in account current with Syed Abdulla bin Omar al Junied, Syed al bin Omar al Junied, and Syed Haroon bin Omar al Junied, executors to the estate of Syed Ali bin Mohamed al Junied, late of Singapore, deceased."

Now although Syed Ali bin Mohamed al Junied was the father of Sherifa Fatimah, and Syed Abdulla, one of his executors, yet no reference was made to this in the petition which was limited to the estate of Syed Haroon. A second account was filed, the heading being "Syed Haroon bin Omar al Junied in account current with Syed Ali bin Mohamed al Junied, Syed Abdulla bin Omar al Junied, and Syed Ali bin Omar al Junied, executors to the estate of Syed Omar, late of Singapore, deceased." A third account was headed: "In the estate of Syed Haroon bin Omar al Junied, late of Singapore, deceased, in account current with Syed Abdulla bin Omar al Junied, administrator to the said estate." This, it will be observed, is the account that was particularly asked for by the petition; and finally an account headed "Sherifa Fatimah binte Ali bin Mohamed al Junied, in account current with Syed Abdulla bin Omar al Junied," showing a final balance due to her of

\$3,304.81½. On Thursday, 15th December, 1864, an order of Court was made, whereby it was ordered that all matters in difference between the said parties, be referred to the award, arbitration and final end and determination of Syed Mohamed bin Alwee al Hadad and Syed Salim al Sree, and in case the arbitrators should not be able to agree concerning the making of the said award then, and in such case to the umpirage and final end and determination of Syed Hassan bin Alwee bah Rekman as umpire. On the 13th January, the arbitrators made the following award.

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—
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"All honors to God the only one God. This is what we Syeds have weighed and decide to the best of our abilities. After enquiring into the complaint of Syed Awath bin Omar Shatree and his wife Sherifa Fatimah binte Ally bin Mahomed al Junied, against Syed Abdulla bin Omar al Junied, and examined the account books kept by Syed Abdulla bin Omar al Junied. Whereupon that which must go to Syed Haroon bin Omar al Junied from the estate net, after deducting expenses, is twenty-three thousand and nine hundred and eighty-nine Reals and eighty-five cents, [23,989 Reals 85 cents,] the share of Sherifa Fatimah aforesaid, is one-fourth which amounts to five thousand nine hundred and ninety-seven Reals and forty-six cents, [5,997 Reals 46 cents.]

Her share from her deceased father Syed Ally bin Mahomed al Junied's estate, in rents and other ways, ending in the month of Rabualakir in the year one thousand two hundred and eighty [1280] as per account kept by Syed Abdulla bin Omar al Junied, which have been examined, after deducting payments to her, there appears a balance in her favor of fifty-four Reals and seventy-eight cents, [54 Reals 78 cents.]

In regard to the complaint by Syed Awath bin Omar and Sherifa Fatimah, the two aforesaid against Syed Abdulla aforesaid about her share from her deceased husband Syed Haroon's share in the rents of houses and land that are remaining, and the accounts of the balance of the one-third of the rents remaining. We, Syed Mahomed bin Alwee al Hadad and Syed Sallim bin Alwee al Sree, do disagree in these matters, we therefore, refer these matters to the [Umpire] third party Syed Hassan bin Alwee bah Rekman.

In regard to the costs of this suit, also in regard to the request of Syed Abdulla bin Omar al Junied, that trustees be appointed over the estate of Sherifa Fatimah, we disagree between us two, therefore we refer this matter also unto Syed Hassan aforesaid.

This is all what appears plain and clear to us Syed Mahomed and Syed Sallim, as per order of Court, given by the Judge, dated the 15th day of December, 1864.

Written and done at the Port of Singapore, on the 14th of Shaban, 1281 [corresponding with the 13th January, 1865.]

Sd. The signature of Syed Mahomed bin Alwee al Hadad.

Sd. The signature of Syed Sallim bin Alwee al Sree."

On the following day, the 14th January, the Umpire made the following award upon certain matters, upon which the two Arbitrators could not agree :—

"All praises to God who is a true and just Judge. What I know about the matters upon which Syed Mahomed bin Alwee al Hadad and Syed Sallim bin Alwee Sree do disagree, which is in relation to the claim of Syed Awath bin Omar al Shetree and Sherifa Fatimah binte Syed Alley bin Mahomed al Junied, against Syed Abdulla bin Omar al Junied for her share from the estate of her late husband Syed Haroon bin Omar al Junied, from the rents of houses and lands that remains, and the accounts of the balance of the one-third of rents collected, I understand, and to cut this matter in two, I decide to put an end to these disputes, I award fourteen thousand Reals [14,000] to

SIDGREAVES, put a stop to all manner of claims that Sherifa may have under the interest of her late husband Syed Haroon bin Omar al Junied, and with that which Syed Mahomed and Syed Sallim aforesaid have awarded above, viz, five thousand nine hundred and ninety-seven Reals [5,997] and forty six cents [46] together with the balance in her favor from her late Father's estate, fifty-four Reals [54] and seventy-eight cents [78] as above written makes a total of what is to be paid to her twenty thousand Reals [20,000] and fifty-two Reals [52] and twenty-four cents [24] and all manner of claim or suits that may hereafter be raised by Syed Awath bin Omar and Sharifa Fatima binte Ally the aforesaid two persons or by their Attorney, or their heirs against Syed Abdulla bin Omar al Junied, or against the heirs of Syed Haroon, or by Syed Abdulla the aforesaid, or the heirs of Syed Haroon aforesaid, against Syed Awath and Sherifa Fatima, the two aforesaid, or their heirs such suits or claims are to be void, nor are they to be entertained or admitted.

In regard to the costs of this suit each party to bear his own costs.

In regard to the request of Syed Abdulla bin Omar aforesaid about Trustees, is left to the pleasure of the Judge.

This is what I understand and what has entered into my senses, acting under the order of the Judge, dated the 15th day of December, 1864.

Done and written at the Port of Singapore, on the 15th day of Shaban, 1281, carry with the 14th of January 1865.

Sd. The signature of Syed Hassan bin Alwee bah Rekman.
May God enlighten me."

It is rather curious that in these two awards no reference whatever is made to Syed Omar's estate, the contention of the defendants being that although the petition refers only to Syed Haroon's estate, of which Abdulla was the sole Administrator, yet that the claim of Syed Haroon, upon Syed Omar's estate, of which latter estate, Abdulla was Executor, conjointly with two others, was taken into consideration by the Arbitrators and Umpire and decided upon; and it is also curious that after these awards had been executed by the arbitrators, two other papers or writings were added, which do directly refer to the claims of the petitioners upon the estate of Syed Omar. The 1st additional writing is tacked on in the original as it were to the award of the Umpire, but manifestly after the Umpire had executed the award. I do not see how, in accordance with decided cases, I can do anything else, but hold that it forms no part of the award. The law upon the subject, is succinctly stated in *Russell on Awards*, 5th edition, p. 134. "As soon as the award, is made the authority of the arbitrator having once been completely exercised, according to the terms of the reference, is at an end; he is not at liberty after executing the award to exercise a fresh judgment on the case, and alter the award in any particular. If he does so, in fact, the alteration will be merely nugatory, and the award as originally written will stand good; his act will be like a mere spoliation by a stranger, he is so entirely *functus officio*, that he cannot even correct a manifest error, in the calculation of figures." The submission provides, that the arbitrators and Umpire shall make and publish their award in writing, ready to be delivered to the said parties, or either of them, as shall require the same,—but to quote again from *Russell*, p. 243: "So far as the validity of the award is effected it would, in general be considered as published,

"as soon as the arbitrator has done some act, whereby he becomes *functus officio*, and has declared his final mind, and can no longer change it, *i.e.*, as soon as he has made a complete award." And in accordance with the cases of *Brown & Vawser*—4 East 584, and *Henfree v. Bromley*, 6 East 310, I must hold, that the award having once been complete by the first signature of the Umpire, and being then ready for delivery, there was an end of the Umpire's authority. The second paper, dated the 14th January, is clearly inadmissible upon the same principles; and indeed, it purports to be nothing more than an explanation of the nature of the award.

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I have no doubt, however, that this award was a final and conclusive judgment between the parties, as to all matters referred by the submission. I have no doubt moreover, that the award has been acted upon by the parties, and it was made between the same parties as in the present suit, and in respect of the same cause or causes in action, undoubtedly, it is an effectual bar to the present suit. An award however on a submission of all matters in difference, is no bar to the recovery of a demand which, though it existed as a claim at the time of the reference, was not then a matter in difference, *Russell*, p. 500, and to the same effect in *Chitty's Archbold's Practice*, 12th edition, p. 1,704: "It has been held, that a reference of all matter in difference between the parties, does not preclude one of the parties from afterwards suing for a cause of action subsisting at the time of the reference, if such matter were not a matter in difference between the parties, nor laid before the Arbitrators."

In considering therefore, whether the present suit commenced in June, 1877, is barred by the award made in the suit in 1864, it is clear that it can only operate as such a bar, if it is between the same parties and in respect of the same cause or causes of action. It is, of course, clear that nominally the parties are not the same, but it is contended that practically they are so. The petition of 1864 contains no reference to the dual position of Syed Abdulla as sole administrator of Syed Haroon and Executor of Syed Omar. It refers exclusively to his dealings with the estate of Syed Haroon, and the prayer is to have the assets of the said Syed Haroon administered in this Court, so that we may consider that the suit of 1864 between Syed Awath and Sherifa Fatimah his wife, was brought against Syed Abdulla for the sole purpose of having the estate of Syed Haroon administered under the directions of the Court. Neither does the defendant in his answer, filed on the 10th of August, 1864, seem to treat the matter in a different light; besides being administrator to Syed Haroon and Executor of Syed Omar, he was also co-executor with his brother to the estate of Syed Ali bin Mohamed al Junied, father of Fatimah, and wife of Syed Awath. It is on that account, no doubt, that Syed Abdulla has filed these various accounts along with his answer; but I cannot gather from his answer that he considers himself in any way called upon to account in respect of his Executorship of Syed Omar's estate, except as regards assets that have come into his hands as Administrator of Syed Haroon in

SIDDERAVES, respect of Syed Haroon's estate. In the answer there are only two references to Syed Omar's estate. In the first he says :—

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"It is true that the defendant, on the 24th day of July, 1861, filed an account of his intromissions, with the said estate, showing a balance of \$4,351.30 in favour of the estate, but it is not true that the said account was or is incorrect or defective, but on the contrary thereof, the defendant avers, that the said account is correct and complete, and that the complainants have always had, and now have the fullest access to the books and accounts of the estate of the said Syed Haroon, and to the books and accounts of the estate of his late father Syed Omar bin Ali al Junied, and to the books and accounts of the father of the complainant Sherifa Fatimah binte Ali bin Mohamed al Junied, and have had every means of ascertaining if there were any and what defects and inaccuracies in the said accounts."

In the second, after referring to a certain family arrangement, he says :—

"And in furtherance of this arrangement, when the complainants were married, the defendant paid to the complainant Sherifa Fatimah, &c., the whole amount of the sums accrued due on the share of her late husband Syed Haroon's father's estate, whereas if the affairs of the family had been administered, according to English law, these rents would have been credited to the estate of Syed Haroon, &c., in which case the complainant Sherifa Fatimah, &c., would have been entitled to a half share therein only instead of to the whole, the said amount then in the defendant's hands as Administrator of Syed Haroon, &c., Syed Haroon's estate, representing the balance due to Syed Haroon out of the estate of his late father, Syed Omar, &c., at the time of the death of the said Syed Haroon bin Omar al Junied."

We cannot gather then either from the petition or the answer that Haroon's claim to his unadministered share in his father's Will, was one of the matters in dispute between the parties, before the arbitrators and Umpire. The submission is general, and the award [without the explanatory additions which, I consider, form no part of the award] contains no reference to it. If the estate of Syed Omar had been fully administered and the whole of Syed Haroon's share had been received into the hands of Syed Abdulla as his executor, then undoubtedly the whole could have been recovered against Abdulla as assets which had come into his hands, but if the estate of Syed Omar had not been fully administered and Syed Abdulla as administrator of Syed Haroon, had not received the share of Syed Haroon, it is exceedingly unlikely that he would have wished to make himself liable by anticipation for what he had not received. That the estate of Syed Omar had not been fully administered at the time of the making of the account, the Will itself and the undisputed portions of the petition of 1877 put, I think, beyond all doubt. The conclusion to which I am drawn is that after the execution of the award something happened, some communication probably was made to the Umpire which induced him to think that it would be a good thing to relieve Syed Abdulla as one of the executors of Syed Omar from all further claims upon that estate, so far as Sherifa Fatima, widow of Syed Haroon and wife of the present petitioner, were concerned. Hence the foot-note and the subsequent

paper which I consider were abortive attempts on the part of the Umpire to do that which he had no authority whatever to do. I hold, therefore, that the award is no bar to the prosecution of the present suit by the petitioner.

I now proceed to consider whether the petition of the plaintiff can be said to be barred by the Statute of Limitations or by the *laches* and *acquiescence* of the plaintiff. These grounds may be taken together, for although a Court of Equity when it has concurrent Jurisdiction with the Courts of Common Law, will act in obedience to the Statute, yet when the demand is of a purely equitable nature, it will follow a rule of its own, to use the language employed in *Story's Equity Jurisprudence*, 10th edition, section 529.

"When the demand is not of a legal nature but is purely equitable, or when the bar of the Statute is inapplicable, Courts of Equity have another rule, founded sometimes on the analogies of the law where such analogy exists, and sometimes upon its own inherent doctrine not to entertain stale or antiquated demands, and not to encourage laches and negligence."

And in section 1520,

"The Statutes of Limitation where they are addressed to Courts of Equity as well as to Courts of Law, as they seem to be in all cases of current Jurisdiction at Law and in Equity [as for example in matters of account] to which they directly apply, seem equally obligatory in each Court. It has been very justly observed that in such cases, Courts of Equity do not act so much in analogy to the Statutes as in obedience to them; in a great variety of other cases, Courts of Equity act upon the analogy of the Limitations of Law."

"But a defence, peculiar to Courts of Equity, is founded upon the mere lapse of time, and the staleness of the claim in cases where no Statute of Limitations directly governs the case. In such cases, Courts of Equity act sometimes by analogy to the law, and sometimes upon their own inherent doctrine of discouraging for the peace of society, antiquated demands, by refusing to interfere, when there has been gross laches in prosecuting rights or long and unreasonable acquiescence in the assertion of adverse rights."

As the objects sought to be obtained by this suit, would be absolutely unattainable in a Court of law, the demand may be looked upon as of a purely equitable nature, and to be decided upon, entirely by the rules existing in Courts of Equity. The matter arises out of a Probate of the Will of Syed Omar bin Ali al Junied, granted so far back as the 10th of January, 1853, to Syed Ali bin Mahomed al Junied, Syed Abdulla bin Omar, and Syed Ali bin Omar, the Testator having died on the 6th of November, 1852. The law in force in this Colony regarding the granting of Probate and Letters of Administration, is defined by section 48 of Ordinance V. of 1873, which enacts that

"The practice in granting Probates and Letters of Administration shall be as at present, with such modification as may be seen to be necessary to do justice among the various classes of the native inhabitants, according to their several religions and customs, and subject to such rules and orders as may, from time to time be made by the Court under section 51."

For the regulations as to the conduct of Executors and Administrators, we still have to refer to the *Letters Patent* of the 10th of August, 1855—the case of *Yeap Cheah Neo v. Ong Cheng Neo*,

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SIDGREAVES, L. R. P. C., appeal cases, vol. VI. p. 381, [a] having decided that although Ordinance V. of 1868, enacted that the Court of Judicature established under the *Letters Patent* above referred to, was thereby abolished, and that the *Letters Patent* should cease to have any operation in the Colony, yet that the effect of the 4th section and the 1st section taken together was that, whilst the repealed *Letters Patent* ceased to have any operation of their own, all the provisions contained in them applicable to the Old Court, were virtually re-enacted and made applicable to the New Court which was put in its place, as effectually as if they had been repeated at length in the Ordinance. The regulations above referred to contained in the *Letters Patent* are as follows :

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“ And we do further ordain and require that the Court shall fix certain “ periods when or within which all persons, to whom probates of Wills and “ Letters of Administration shall be granted by it shall, from time to time, un- “ til the effects of the deceased person shall be fully administered, pass their “ accounts relating thereto before the Court. And in case the effects of the “ deceased shall not be fully administered within the time for that purpose so “ fixed, then or at an earlier time if the Court shall see fit so to direct, “ the person or persons to whom the same respectively shall be granted, “ shall pay and deposit the balance of money belonging to the estate of the “ deceased, then in his, her or their hands, and all money, &c., in manner “ therein directed And we require that the said Court shall, “ from time to time, make such order as shall be just for the due administra- “ tion of the assets, and for the payment or remittance thereof as occasion “ shall require to or for the use of any person or persons, whether resident or “ not resident in the said Settlements, who may be entitled thereto or any “ part thereof as creditors, legatees, or next-of-kin or by any other right or “ title whatsoever.”

It is contended, however, on behalf of the defendants that the Court has no longer power to discharge the duties imposed upon it, and that even although it should consider that an order for the due administration of the assets should be a just order, yet it is to be debarred by the laches of the plaintiff, and of those who have preceded him in his present office from making such an order. On the part of the plaintiff, section 2 of Act 14 of 1859 was relied upon as taking the case at all events, out of the operation of the Statute of Limitations :

“ No suit against a trustee in his lifetime, and no suits against his repre- “ sentatives for the purpose of following in their hands the specific property “ which is the subject of the trust, shall be barred by any length of time.”

And it was contended on behalf of the defendants that this section was not applicable to the present suit, but that it was governed by the 11th sub-section of section I :

“ To suits in cases governed by English law upon all debts and obliga- “ tions of record and specialities and to suits for the recovery of any legacy “ a period of 12 years from the time the cause of action arose.”

It was urged that no express trusts were created by the terms of the Will as regarded the 70 years clause, that the executors took no estate on trust, but that the beneficiaries took an absolute

estate on the death of the testator, and that similarly the 20 years clause of the Will is also illegal and void. As was pointed out, however in the argument, the section above referred to was much stronger than the English Act 3 & 4 Wm. IV., section 25, which enacts that :

"When any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que* trust or any person claiming through him to bring a suit against the trustee or any person claiming through him to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him."

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The question as to the construction of the Will has been held over, pending the determination of the Court upon these preliminary points. It is quite clear that whatever the decision of the Court may be as regards these clauses, they have been adopted and acted upon by the executors as being fully operative. At the time of the death of the testator, the heirs who were to be beneficially interested under the Will, were all or many of them minors, and the whole of the property bequeathed for their benefit was taken possession of by the executors, and the rents received for the purpose, we must presume, of carrying out the trusts implied or constructive of the Will. They are charged in the petition with having fraudulently abused their position, for the purpose of defrauding the persons beneficially interested under the Will, and of misappropriating the funds which came into their possession as executors. It would certainly be strange if they could now be allowed to turn round and say: "It is true that under a Mahomedan Will, which was never intended to come into an English Court of Justice, we have received and misappropriated large sums of money intended for your benefit, under the impression that we were trustees for you under the Will, but as we are advised that by English law those bequests will probably be held void, we must decline to consider ourselves as trustees at all, and decline also to give any account of the money which we have so misappropriated." It appears to me that such a doctrine as that would hardly be considered as adopting such modifications of our own practice, as may seem to be necessary to do justice among the various classes of the native inhabitants according to their several religions and customs or to be in conformity with the regulations as to the conduct of executors and administrators which I have already quoted from the *Letters Patent*. Even if the various bequests contained in the Will could be construed as amounting simply to bequests of legacies, it would still be difficult to contend that, under all the circumstances set out in the petition, they had not assumed the character of a trust fund, and so would render the executors acting as trustees liable for a breach of trust. In the case of *Phillippo v. Munnings*, 2 Mylne & Craig, p. 309, a specific legacy of £400 was bequeathed upon certain trust for the maintenance and education of John Buskall, till he should attain 24 years of age, when it was to be paid to him. If he died before attain-

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ing 24 years of age, then it was to be paid to the plaintiffs. He died in the year 1800, under the age of 24 years, but it was not till the year 1834, that the plaintiffs filed their bill against the executor. The defendant, by his answer, admitted the principal facts, but claimed in bar of the suit the same benefit of the statute of limitations, and of the laches of the plaintiff's in putting their claim in suit as if he had pleaded the same in bar to the bill. Upon argument, the defendant's counsel using language very similar to that which was used in argument in the present case, said:—

“The 40th section of the recent Statute of Limitations, 3 & 4 Wm. IV., C. 27, is a complete bar to the plaintiff's demand in this suit. It will be argued for the plaintiffs, that this is not a suit for a legacy, but a suit to make the defendant answerable as a trustee. That argument however goes too far; for every executor is a trustee, and every suit for a legacy is a suit to compel the performance of a trust, and if the argument were to prevail, the consequence would be, that there would be no case to which this part of the statute could apply and the express provision which the Legislature has made, would be entirely inoperative.” The Lord Chancellor:—“A man who being in possession of a fund which he knows to be not his own, thinks proper to sell it, and apply the produce to his own use certainly does not come before the Court under circumstances which entitle him to much indulgence, and the only question is whether by the Statute which has been referred to, I am prohibited from entertaining this suit to make him responsible for that breach of trust. The whole fallacy of the defendants argument consists in treating this suit as a suit for legacy. Now the fund ceased to bear the character of a legacy as soon as it assumed the character of a trust fund. Suppose the fund had been given by the Will to anybody else, as a trustee, and not to the executor; it would then be clearly the case of a breach of trust. In this case, the executor when he severed the legacy from the general personal estate, could not pay it over to any other person, he was bound by the direction of the testator to hold it, upon certain trusts until the legatee attained 24. What he would have done by paying it to a trustee he has done by severing it from the testator's property and appropriating it to the particular purpose pointed out by the Will.

“It is impossible to consider that the executor so acting, is acting as an executor; he has all this while, been acting as a trustee.

“This suit must be considered not as a suit for a legacy, but as a suit to compel a party to account for a breach of trust; and it is clear, therefore, that it is not within the terms of the Act in question.”

So in the present case, I think, it may fairly be said that the executor has been acting as a trustee in receiving the rents and profits of the testator's estate upon the implied trusts of the Will, and that this suit may be considered, not as a trust for a legacy, but as a suit to compel parties to account for breaches of trust.

In considering the question of *laches*, each case must of course, stand upon its own individual merits and be governed by the peculiar circumstances applying to it and in taking those circumstances into consideration in the present instance, it is impossible to leave out of sight the fact that this is almost entirely a family matter, that the Will and the bequests contained therein were of an essentially Mahomedan character, and that the wishes of the testator as expressed therein could only be carried into effect by carrying it out as a family arrangement, and keeping aloof from Courts of Law. Syed Haroon, the person beneficially entitled, on whose account the present claim is made, and the young widow who survived him, must have had every reason to suppose, and to hope that the two acting executors, the sons of the testator, and

the brothers of Syed Haroon himself specially appointed by their father, to protect the interests of their infant brothers and sisters, would prove faithful to the trust and confidence reposed in them, and carry out the intentions of the testator without the necessity of an appeal to a Court of Law. But even if they had become suspicious of the conduct of the executors, matters had become so involved that it was almost impossible to seek redress with any chance of obtaining it. When Syed Haroon died in 1860, Sherifa Fatimah, his widow, was only 17 years of age; it was impossible, therefore, for her to take out Letters of Administration to her late husband, and the result was that they were granted to Syed Abdullah, who was not only one of the two acting executors of Syed Omar, but also one of the executors of Syed Ali bin Mohamed al Junied, the father of Sherifa Fatimah. Thus, Syed Abdullah, as regards this widow of 17 years of age, stood in the position of administrator to her husband, executor to her husband's father and executor to her own father. In 1864, however, the year that she came of age, and being then married to Syed Awath, the present plaintiff, she did bring the suit which has already been set forth against her brother-in-law Syed Abdullah. That seems to have been all that was possible for her and the present plaintiff, to have done at the time. They proceeded against Syed Abdullah as the administrator of Syed Haroon, but to recover the share to which Syed Haroon was entitled under the Will of his father Syed Omar, or to have that estate duly administered, it would have been incumbent upon Syed Haroon's administrator himself to have taken the initiative. Now as Syed Ali the other acting executor, under Syed Omar's Will, had left Singapore for Arabia in 1862, Syed Abdullah was the only acting executor under that will, so that to effect the object sought for, a suit would have been necessary by Syed Abdullah, administrator of Syed Haroon, against Syed Abdullah, executor of Syed Omar. He left Singapore himself in the year 1865, dying in Arabia in May, the same year. I do not think that it can possibly be contended, that up to the death of Syed Abdullah, at all events, either Syed Haroon or Sherifa Fatimah can be said to have been guilty of laches, in not attempting to do that which was practically an impossibility.

After the death of Syed Abdullah, the suit brought by Sherifa Fatimah in 1864, was revived against Abdullah's executors Syed Junied and Syed Aboobaker, and is stated to be still pending in this Court. This revived suit seems to have proceeded very slowly. The petition was filed on the 6th of November 1866, demurrer was joined to the suit by the executors, on the 17th of July 1867, and on the 18th of April 1868, an affidavit was filed by the defendants in support of a motion for the examination of a material and necessary witness about to leave the Settlement. On the 11th of June 1870, another petition was filed by the present petitioner and Sherifa Fatimah his wife, stating amongst other things that Sherifa Fatimah had obtained a grant of Letters of Administration to the estate and effects left unadministered of the said Syed Haroon, and had thereby become the legal personal representative of the said Syed Haroon, and praying that the said suit might be revived

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against Sherifa Fatimah, as the administratrix *de bonis non* of the said Syed Haroon. It was urged that the bringing these various suits and not proceeding with them, could not be treated as in any way operating to prevent the bar of the Statute of Limitations or of laches; but I think that in considering the whole question as to whether the parties have been guilty of laches or not, all their acts are of importance, and that *bona fide* though abortive attempts to enforce their rights cannot be left out of consideration. The difficulties that must have arisen in ascertaining and settling the rights of the various parties interested under the Will, appear from an attempt that was made to settle them in December, 1875. An Indenture spoken of as a deed of arrangement was made on the 31st of that month, between Syed Ali bin Omar al Junied, late of Singapore, merchant, but at present residing at Mecca in Arabia of the first part, Syed Junied, and Syed Aboobaker of the second part, Sherifa Noor, wife of Syed Salim, Syed Hamid, Sherifa Zena, wife of Syed Agil, Syed Omar bin Abdulla al Junied, Sherifa Sara binte Abdulla al Junied, Syed Haroon, Syed Abdulrahman, Sherifa Ayesha of the 3rd part, Syed Salim, late of Singapore, but at present residing at Hydrumont in Arabia of the 4th part, Syed Mohamed, Syed Agil, Syed Hussain, and Syed Omar of the 5th part, Sherifa Shaika widow, of Singapore, of the 6th part, Sherifa Bohya, wife of the said Syed Hamid of the 7th part, Sherifa Fatimah of the 8th part, and the said Syed Junied of the 9th part, the said Syed Aboobaker of the 10th part, the said Syed Abdulrahman of the 11th part; and the said Syed Alwee and Syed Omar of the 12th part. This deed recited what had taken place before the death of Syed Abdulla and that he died in May, 1865, without having completed the administration of the said estate, or finally divided the residuary personal estate of the said testator among the persons entitled thereto under the said Will, that since the death of the said Syed Abdulla until the month of April, 1875, the said Syed Junied and Syed Aboobakar received the rents and profits of the real and leasehold estates of the said testator under a power of attorney from the said Syed Ali. After some further recitals of different family arrangements and the difficulties, there were in carrying them out the deed goes on to say:

"And whereas in consequence of the difficulties in the construction of the Will of the said Syed Omar deceased, and the confused state of the accounts of the estate of the said Syed Omar, deceased, left by the said Syed Abdulla upon his death, great disputes and differences have arisen between the parties entitled under the Will, and the said Syed Ali as executor of the said Syed Omar and the said Syed Junied and Syed Aboobakar as executors of the said Syed Abdulla, the said parties or some of them claiming from the said Syed Ali and the executors of the said Syed Abdulla, large sums in respect of the personal estate of the said testator, said to have been received by them or one of them, and also of the rents of the said real and leasehold estates said to have been received by them or one of them, and on or about the 15th day of December, 1874, a suit was instituted in the Supreme Court of the Straits Settlements, division of Singapore, in which the said Syed Ali was plaintiff and the said several persons parties hereto of the 2nd, 4th, 6th, 7th, 8th, 9th, 10th, and 11th parts, were defendants and also another suit of the said Court in which the said Syed Ali was plaintiff and the said Syed Junied, and Syed Aboobakar were defendants. And whereas

"the said several persons parties hereto, being desirous of putting an end to the said law suits and all further family dissensions, disputes and disagreements, such litigation between members of one family being contrary to the spirit of their religion, and the express directions contained in the Will of the said Syed Omar deceased, have mutually come to the arrangement hereinafter contained; And whereas it is considered that Syed Haroon, a son of the deceased having died in infancy and without issue by the terms of the said Will, the share which he would have taken in the estate of the testator became vested in his several brothers and sisters who survived him, and further that any claim which his widow and administratrix might have upon the estate of the said Syed Omar, has been already settled by arbitration, but the parties to these presents have agreed to set aside monies to answer any claim on the part of the said administratrix and to enter into the mutual indemnities in respect thereof hereinafter contained."

This last recital summarily disposes of the claims of the present plaintiff, but the first point having yet to be the subject of a judicial decision and having found that the claims which his widow and administratrix might have upon the estate of the said Syed Omar, had not been settled by arbitration, it may be considered as premature. It is quite clear, however, that after the death of Syed Abdulla, the sole acting executor with the surviving executor in Arabia and the executors of the deceased acting executor acting under a power of attorney from Syed Ali the absent surviving executor, very great difficulties indeed would be placed in the way of Sherifa Fatimah and her husband the present plaintiff obtaining a recognition or settlement of their claims. Great delay took place, no doubt, but up to 1875 at all events, all the rest of the family seem to have equally participated in the delay and from the same causes. The question seems to be whether this delay can be excused or justified by peculiar circumstances, and it seems to me that taking all the circumstances into consideration, a strong case has been made out in excuse and justification of the delay, and that this Court as a Court of Equity cannot either on the ground of *laches* or acquiescence dismiss the plaintiff's suit. Upon all the grounds therefore argued before me I find in favor of the plaintiff.

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The limitation to an action for goods sold and delivered, where there is no writing, other than the receipt for the goods, is 3 years under sub-section 9, Clause I. of Act XIV. of 1859, as the non-payment of the price of the goods, is merely a breach of contract.

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May 9.

This was an action for pepper sold and delivered by the plaintiff to the defendants, five years before suit. The defendants pleaded the Statute of Limitation, namely, 3 years. The plaintiff, was a foreigner, and had never come to this country. The defendants were residents of Penang. The pepper was delivered at Acheen in Sumatra.

Van Someren, for defendants contended that the debt was barred by the Indian Act XIV. of 1859. The Act of James must, and has been considered to have been abolished by this Act. The

WOOD, J. 1878. plaintiff's absence is nothing. Thompson on Statute of Limitations, p. 284 & 285, citing *Shoobol Koolal v. Domun*, 10 W. R. 253, and *Venkatta Saba v. Giri Ammal*, 2 Mad. H. C. Reports 113—also section 13 of the Act. Thus the period of 3 years has run, and so the remedy barred by section 1, sub-section 9, which enacts "to suits.....for the breach of any contract the "period of three years from the time when.....the breach of contract in respect of which the suit is brought first took place, unless "there is a written engagement to pay the money lent, or interest "or a contract in writing signed by the party to be bound thereby "or by his duly authorized agent." There is no contract in writing, and so the case does not come within sub-section 10, which is the same as section 9, except that it refers to written engagements or contracts which could have been registered and which were not registered within six months, the only contract being the receipt put in, signed by the Nacodah. Sub-section XVI. which applies to all suits for which no other Limitation is provided, is inapplicable to the present case, as sub-section 9, applies to it. That sub-section 9 is the one that is applicable, is clear from *Thompson on Statute of Limitation*, p. 133-4, citing *Lall Mohun Holdar v. Mahabit Kattu*, 9 W. R. 193, and *Woonkur Pershad Rustobe v. Phool Komarie Buhee*, 7 W. R. 67-68. This is only the case of a breach of contract, and the breach of contract existed on September 22nd, 1873. There is no contract in writing. *Lakshmanijan v. Sivasamy*, 4 Mad. H. C. Rep. 216, cited in Thompson [appendix] p. 383. Part payment does not take it out of the Statute of Limitations, Thompson, 246-248.

Thomas, for plaintiff, contra.

WOOD, J. The case is merely one of breach of contract, and falls within sub-section 9, of section 1, of the Limitation Act XIV. of 1859, and is barred, being over three years.

Judgment for defendants.

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July 15.

The Court is not bound by the translation of a Will, which is attached to the Probate, if such translation is incorrect—but may look at the true translation, and go into evidence to find what the true translation is.

Probate is granted by the Superior Courts to the Will of a testator, and not to the translation of same, although made by the Interpreter of the Court.

This was a suit to have it declared that, on the true translation of the Will, of one Lim Kong Wah, deceased, the plaintiff was entitled in fee to certain lands, which the defendants as receivers of one, Oh Yeo Neo, deceased, had taken possession of, as part of the property of the said Oh Yeo Neo. Probate had been granted to the Will of the said Lim Kong Wah, a great many years ago, and at that time, a translation was made by the then Interpreter of the Court, and which was attached to the petition for Probate, at time of the application for same. A copy of this

translation was in the usual course attached to the Probate when it was issued. The plaintiff contended that this Probate translation was incorrect, and that, on the correct translation, he was entitled to the property. Probate had not been obtained to the Will as newly translated. The bill set out these facts. The defendants demurred.

Van Someren, for the defendants, and in support of the demurrer. The plaintiff sets out that Probate was granted of the Will, and that by the translation of it, attached to the Probate, a certain construction, adverse to him is apparent, whereas in truth, and in fact, and according to the true translation, as he alleges, of the Will, the words used by the Testator, give to him an absolute interest. It is submitted, however, that the translation of the Will attached to the Probate, should be held to be the true translation, and that of which probate was given, and the alleged correct translation could not be looked at, *Williams on Executors*, p. 461 [4th Edn.]

Ross, in support of the Bill.

Wood, J. I consider that with the authority of *L' Fit v. L'Batt*, 1 P. Williams, 526, before me, which lays down that "Probate is granted by the Spiritual Court of the Will, and not "of the translation, which translation, a Spiritual Court has no "power to make," that judgment must be for the plaintiff on this point.

It is directly stated in the petition that Probate was given of the Will, and that the translation was merely attached thereto, leaving the Court to the plain inference, that the Spiritual Court had acted in conformity with its true power of granting Probate of the written language of the testator, not of the written language of the clerk, who, for the information of the public, makes the translation; and that, consequently, errors in this translation were not errors in a record, but errors in a matter which is no part of it. The demurrer must be overruled.

CHARTERED MERCANTILE BANK OF INDIA, &c.,

v.

LETCHMAN CHETTY & ANOR.

It is now settled law, that the holder of a joint, or joint and several bill or promissory note is, in dealing with it, affected by knowledge acquired, even after taking the bill or note, as to which of the parties liable is principal and which is surety.

Giving of time to the principal under such circumstances, for valuable consideration, but without the surety's knowledge, operates to discharge the surety. If the surety under these circumstances is aware of the fact of time being given, but does not dissent from it, he will not be discharged.

A creditor in giving time under such circumstances to the principal, without the surety's consent, may, also without the surety's consent, nevertheless, reserve his rights against the surety, and he will not be discharged.

The nature and facts of this case are fully set out in the judgment.

Clarke, for plaintiff.

Van Someren, for defendant, Anamalay Chetty.

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YONG
v.
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& ORS.*

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November 7. *Wood, J.* This was an action for a balance of \$6,023.16, besides interest due on a joint and several promissory note for \$12,000, made by both the defendants. The case as against Letchman Chetty went by default, but the defendant Anamalay Chetty pleaded.

1st.—On equitable grounds that he made the note as surety only for the 1st defendant, of which the plaintiffs had notice, and that the plaintiffs, whilst holders of the note received for good and sufficient consideration from Letchman Chetty, in lieu of part of the balance, a bill of exchange for \$5,000, drawn by Letchman Chetty on his principals, Letchman Chetty and Anamalay Chetty payable at Negapatam, and for the balance received and accepted from the said Letchman Chetty, an assignment of several judgments obtained by the plaintiff and others on his behalf, against divers persons whereby the defendant Anamalay was released and discharged.

2nd.—Another equitable plea repeating the fact of the suretyship and the knowledge of the plaintiffs thereof, and alleging that the plaintiffs without the knowledge and consent of the defendant Anamalay, and for a good and sufficient consideration, gave time to the defendant, Letchman Chetty, whereby the defendant Anamalay was discharged.

3rd.—A similar equitable plea alleging that the plaintiffs obtained of the defendant, Letchman Chetty, certain securities for the monies due on the note, but the plaintiffs deprived the defendant Anamalay, of the benefit of such securities, by negligently parting with the same, whereby the defendant was released and discharged.

On the trial of this case the third plea was practically abandoned, and as to the judgments received, it was clear that they were taken as collateral security only, and not in discharge of any principal sum; the contention in reality taking place, on that part of the 1st and 2nd plea, which alleged that time had been given to the principal, for good consideration, without the knowledge and consent of the surety, by the plaintiff taking from the principal a bill of exchange; drawn by the principal on certain persons in Negapatam, and payable there. That this bill was, in fact, a suspension of the remedy against the principal Letchman Chetty, and a giving of time was also hardly disputed—but it was urged that it was done without the consent of the surety, and that therefore the surety was discharged.

The facts on this point may easily be disposed of. When the plaintiffs began to press for payment, both the defendants attended at the office of the manager of the plaintiffs' bank. Defendant Anamalay had been repeatedly pressed for payment, and he stated that he had no money, that he was not principal, and that the plaintiffs had already received notes and judgments sufficient to repay themselves—and generally that he ought not to pay.

The defendant Letchman Chetty was then pressed for payment, and the defendant Anamalay Chetty also. The defendant

Letchman was then pressed to draw, a bill of exchange on Negapatam, the other defendant, Anamalay being present, fully cognizant of the whole transaction, and expressing no dissent. I have no hesitation in saying that the consent of the defendant to this transaction was fully established, and that the inference is unavoidable that in such a transaction as this, a matter really beneficial to himself as releasing him from immediate pressure, his dissent not expressed was tantamount to an actual and expressed consent, and the judgment must be for the plaintiff on all the issues. Although the matter of fact at issue in this case is, comparatively speaking, simple, so much matter of law was touched on at the trial, that I felt that a considered judgment was called for, in order to set at rest, and inform the public mind as to what really is the mercantile law of England and of this Colony, with respect to several matters affecting the relation of debtor, surety and creditor.

It would naturally occur to any ordinary mind that where money is lent by a person to any two persons upon their joint and several promissory note, the lender is entitled to consider that the note expresses the nature of the contract, and justifies him in ignoring any special relation which may be existing between the parties liable, *viz.*, the relation of principal and surety. That, in lending money to two persons, as it is a matter of indifference to the lender who is the person benefiting by the loan, and who is the mere surety, he looks to them both, and has a right to shut his ears and his eyes to any complicated connection which modifies the relation, which is established by the note given—the equal and independent liability of each of the makers of the note for the full amount of the note, and that he is justified on the note becoming due to treat with each of the parties liable as he pleases, without reference to their relations *inter se*.

Accordingly, Mr. Robilliard, the manager of the plaintiffs' bank, Mr. Nina Merican Noordin, Mr. Vapoo Noordin, Verapah Chetty and Moona Verapah Chetty are strong in their conviction of the soundness of this view of the right of a lender of money on such a joint and several note as this, and that they regard the makers of the note as joint principals, whether or not, they knew or suspected, or had grounds for believing that such a relation as principal and surety existed between such makers, treating this matter of knowledge, as a matter immaterial to themselves.

Mr. Nina Noordin, a banker carrying on large operations, is specially strong in this matter. He says: "I am a banker, I have lent monies to Chetties a great deal. I have had more than \$50,000 out at a time. The custom is to consider both Chetties as principals. I never heard of the idea of a surety—but only of principals. Both are treated alike. If the doctrine of principal and surety applied to Chetties who signed notes, I should never lend him a pice."

As this practice, I may say this misunderstanding of the law as applied to such a case as the one before us, is so strongly entertained by a portion at least, of the mercantile community, I have deemed it not inappropriate to direct the attention of persons

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concerned in such transactions, to a few points of law, with a view to their guidance in future.

Thus, it is now decided law that the holder of a security, is in dealing with the security affected by knowledge acquired after taking the security as to which of the parties liable on the security is principal, and which is surety. *Oriental Financial Corporation v. Overend Gurney & Co.*, 7 L. R. Ch. App. 152, citing and commenting on *Oakeley v. Pasheller* in the House of Lords, reported 10, Bligh 548 & 4 Cl. & Fin. 207.

The somewhat delicate relations which are, by the law of England, declared to exist between principal, surety, and creditor are thus adverted to in *Story's Equity Jurisprudence*, Vol. I., page 251 [Ed. 1861.] Mr. Justice Story in treating of constructive fraud, Chapter VII. section 258, observes :

"By constructive frauds are meant such acts or contracts, as although not originating in any actual evil design, or contrivance to perpetuate a positive fraud, or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate public or private confidence, or to impair or injure the public interest, deemed equally reprehensible with positive fraud, and, therefore, are prohibited by law as within the same reason and mischief as acts and contracts done *malo animo*.

Section 323. There are many cases of persons standing in regard to each other in the like confidential relations [as trustees and *cestui que trust*] in which similar principles [of stricted good faith] apply"

On the whole, the doctrine may be generally stated, that whenever confidence is reposed, and one party has it in his power in a secret manner for his own advantage to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage.

Section 324. The case of principal and surety, however, as a striking illustration of this doctrine, may be briefly referred to. The contract of suretyship imports entire good faith and confidence between the parties, in regard to the whole transaction. Any concealment of material facts, or any expression or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information will, undoubtedly, furnish a sufficient ground to invalidate the contract. *Upon the same ground the creditor, is in all subsequent transactions with the debtor, bound to equal good faith with the surety. If any stipulations, therefore, are made between the creditor and the debtor, which are not communicated to the surety, and are inconsistent with the terms of his contract, or are prejudicial to his interests therein, they will operate as a virtual discharge of the surety, from the obligation of his contract"*

Although at first view the doctrines on this subject may seem to be of an artificial, if not of an arbitrary character, yet, upon closer investigation, they will be perceived to be founded in an anxious desire of the law to apply the principal of preventive justice, so as to shut out the inducements rather than to rely on mere remedial justice, after a wrong has been committed. By disarming the parties of all legal sanction and protection for these acts, they suppress the temptations and encouragements which might, otherwise, be found too strong for their virtue.

It is upon this ground that if a creditor, without any communication with the surety and assent on his part, should, afterwards, enter into any new contract with the principal, inconsistent with the former contract, or should stipulate in a binding manner, upon a sufficient consideration for further delay or postponement of the day of payment of the debt, that will operate in equity as a discharge of the surety."

Into the question of what are the circumstances under which a surety is discharged except, upon the points before us, would be beyond the limits of such a judgment as this. That the law of

principal and surety, in particular, as to the discharge of the surety, by time being given to the principal, has been carried too far, has been the opinion of many judges, but it is a matter of well established law. This point is thus treated of in *The Oriental Financial Corporation v. Overend Gurney & Co.* 7 L. R. Ch. Appeals, 147, wherein the judgment of Sir R. Malins, V. C., is thus expressed in giving judgment in the Court below :—

"I entirely concur with the opinion of many learned Judges, indeed, I may say, almost every Judge who has expressed an opinion on this subject, that this doctrine of discharging the surety by giving time to the principal, is not a doctrine founded upon high principle. It is a doctrine which, as I have had an opportunity of learning from other Judges, is not generally acquired in. It has in many of the judgments I have referred to, been lamented by the Judges that it had become a rule; but it has become so fixed a rule, that it is impossible to interfere with it. Still, I think, it is equally clear that it is not a rule which is to be extended, and I entirely concur in the observation of Sir Anthony Hart in *Hulme v. Coles* [2 Sim. 12], that the principle of discharging a surety by giving time to the creditor is a refinement of the Court of Equity, and that he would not refine upon it."

Lord Hatherly, L. C. in giving judgment in the Court of Appeal, remarks on the above judgment of Malins, V. C., page 150, as follows :—

"It was suggested and the learned Vice-Chancellor seems to have given some weight to the suggestion, that the basis on which this principle rests, has never been fully understood, and that it would have been better had the Court *ab initio* decided, not that the surety should be absolutely released, but that he should be put to prove his injury, and be allowed damages for any injury he might have sustained, and that, therefore, the authorities which have proceeded upon this principle are in no way to be extended.

I do not feel myself at liberty to comment upon the propriety or impropriety of a principle, which, more than half a century ago, was stated by Lord Eldon in *Samuell v. Howarth* [3 Mer. 274] to have been long established, and which has been continually acted upon since that time, and is as well settled and established as any other principle of the Courts of Equity. I think that sometimes the cases are a little open to this observation; that they do not all of them, especially the later cases, clearly and distinctly shew in what way the principle was established and brought to bear. But, undoubtedly, if we look to the earlier cases, amongst which I might cite especially *Oakeley v. Pasheller* [10 Bli. 548] the principle is laid down very clearly that if you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety you immediately turn him upon the principal, and therefore your acts breaks the agreement into which you have entered with the principal. It is not simply neglecting to sue the principal which would have any effect upon the surety, but there must be a positive agreement with the principal that the creditor will postpone the suing of him to a subsequent period.

To shew that this is the principle, we have only to refer to another class of cases, which, down to one very late case, clearly and distinctly established that it is competent to the creditors to reserve all their rights against the surety, in which case the surety is not discharged, and for this reason, that the contract made with the principal is then preserved, because the creditors have engaged with the principal not to sue him for a given time, but subject to the proviso that the creditors shall be at liberty to sue the surety, and so turn the surety upon the principal without any breach of the engagement with the principal. I say that this doctrine has been always recognised down to a late period, because Lord Truro threw some doubts upon it in the case of *Owen v. Homan*, [3 Mac. & G. 378].

But Lord Cranworth, in giving judgment in that case on appeal to the House of Lords [4 H. L. C. 997] said: there could be no doubt about the case

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before the House, and that he did not think he should have entered into any discussion of the case, had it not been for the doubt thrown by Lord Truro upon the principle that you might retain the surety, if that formed part of the original contract as to not suing the principal; and Lord Cranworth said that he thought it right to protest against the doubt, because he thought the doctrine was perfectly clear and established."

In referring to the question of the time at which the knowledge of the relation was communicated to the creditor, and dwelling upon the facts of the case of *Oakeley v. Pasheller* above adverted to, he continues, p. 152 :

"There remains one point upon which Mr. Cole pressed me very strongly he argued that Overend Gurney & Co., at the time when they took the bills knew nothing of this, but believed the plaintiffs to be the principals in every sense of the word as between themselves and McHenry, and as between them and Overend Gurney & Co., and he argued that their position could not be altered by their being afterwards informed of the existence of a different arrangement, and he cited an authority. *Ex-parte* Graham [5, De G. M. & G. 356]. Now in that case the Lords Justices asked if there was any authority to shew that knowledge acquired, subsequently to the engagement, would fix upon the creditors, the obligation of seeing to the interests of the surety; and counsel citing none, it seems to have been held that in that case, the discharge did not take place. But *Oakeley v. Pasheller* [10. Bli. 548; 4 Cl. & F. 207.] is a precise and direct authority upon the point, and being in the House of Lords is, of course, above that of this Court, or that of the Lords Justices.

That is a case distinctly and plainly in point; and I apprehend that the hardship involved in the principle, is not so great as Mr. Cole represents. There is really no hardship in the case, and that is one reason why I proceeded at some little length to shew that the doctrine was not at all infringed upon by the right of the creditor to reserve his remedies against the surety.

The defendant here could have freed themselves from all difficulty whatever, by reserving their rights against the plaintiffs, and if that had been done, the case would have fallen within the principle of *Owen v. Homan* [4 H. L. C. 997], and would have been free from all difficulty."

I have thus endeavoured to bring before the parties interested in this or a like class of cases, the condition of the law as laid down by the best and the latest authorities. The last quoted remarks of Lord Hatherly, L. C., clearly shew that the hardship and supposed unreasonableness of the law, will not be found so great as it was contended at the trial on behalf of the plaintiff, and the large class of lenders of money, that it was. The creditor can, if he pleases still while giving time to the principal, reserve his right against the surety, in what form and manner it would be, foreign to the duty of the Judge specifically, to point out. There will, accordingly, be judgment for the plaintiffs on all the issues.

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v.

TANJONG PAGAR DOCK CO., LIMITED.

The defendants, wharfingers and warehousemen at Singapore, were employed by the plaintiffs to moor all plaintiffs' vessels coming into port, alongside their wharf, and to receive from such vessels all goods intended to be landed at Singapore and to warehouse them. In order to enable the defendants to know what goods were to be thus received by them, the plaintiffs' agents at Singapore furnished them, on or about the expected arrival of such vessel, with the manifest; this manifest the defendants copied into a book kept by them for the purpose, and then returned it. On receipt of the goods by the defendants, they entered them in a separate book, and within a fortnight thereafter sent in to the plaintiffs' said agents, a return of all goods so landed and warehoused; this return had columns also shewing all goods damaged, short landed and overlanded. In the course of the defendants' employment, they having first been furnished with a manifest as usual, received certain goods from a vessel of the plaintiffs, called the *Glenlyon*, and in so receiving these goods, they received certain goods which were not intended for Singapore, but for another port, and which were not on the manifest: these goods they entered, along with the other goods received, into their books as usual, but in their return to the plaintiffs' said agents, they omitted all mention of these overlanded goods; these overlanded goods should, according to their practice and the form of the returns, have been placed in the overlanded goods column thereof. The consignees of these goods at such other port not having received their goods, called on the plaintiffs for compensation for their loss—the plaintiffs' said agents then enquired of the defendants if such goods were with them, but were, through forgetfulness of the fact, told that they were not. Some six months after, on a return being sent in by defendants to plaintiffs' agents, of all goods in their possession, for which rent was due, the overlanded missing goods appeared. The plaintiffs thereupon sued the defendants for damages for negligence in overlanded the goods, and for not informing plaintiffs or their agents thereof, within a reasonable time.

Held, that there was an implied contract by the defendants, and a duty cast upon them, to report to the plaintiffs or their said agents, within a reasonable time, as to overlanded goods in their possession; and that, under the circumstances, they were guilty of negligence in that respect, and were liable to the plaintiffs in damages therefor.

Where a plaintiff has been guilty of negligence, which has, in fact, contributed to the loss complained of, yet, if the defendant could in the result, by exercise of ordinary care and diligence, have avoided the mischief, the plaintiffs' negligence will not excuse him [defendant].

Radley v. London and North Western Ry. Co., 1 L. R. App. Cases, 754, followed.

Action for negligence. Plea not guilty. The facts giving rise to this case are so fully set out in the judgment that they need no mention here.

Bond, for plaintiffs.

Davidson, for defendants.

Cur. Adv. Vult.

On this day, judgment was delivered by *Sidgreaves*, C. J. In this case which was tried before me on the Summary Side of the Court, the particulars of the plaintiffs' claim are set out as follows in the particulars of demand:

"The plaintiffs claim dollars four hundred and eighty and cents thirty-three, the damage sustained by them by reason of the defendants' negligence in overlanded at Singapore in April, one thousand eight hundred seventy-six, eighteen cases and one truss alpaca umbrellas, cargo ex *S. S. Glenlyon* portmarked Manila, and in keeping the same in their warehouse at Singapore aforesaid for an unreasonable time, to wit over six months.

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The plaintiffs also claim the said sum of dollars four hundred and eighty, and cents thirty-three, for damages sustained by them, by reason of the defendants' gross negligence in discharging and landing at Singapore in April, one thousand eight hundred and seventy-six, from the S. S. *Glenlyon*, without the authority of the plaintiffs, other goods than those mentioned in the manifest of the said ship for Singapore, to wit eighteen cases and one truss of alpaca umbrellas, and in keeping the same in their warehouse at Singapore, and not informing the plaintiffs thereof for an unreasonable time, to wit over six months.

The plaintiffs also claim the said sum of dollars four hundred and eighty, and cents thirty-three, for that the defendants for fee and reward in that behalf, agreed with the plaintiffs to discharge from the said S. S. *Glenlyon* and store in the godowns at Singapore, only such goods as were on board the said ship and mentioned in her manifest for Singapore, whereas the defendants landed from the said ship and stored in their godowns eighteen cases and one truss of alpaca umbrellas portmarked Manila, and not mentioned in the said manifest for Singapore, and kept the same for an unreasonable time without informing the plaintiffs thereof, whereby the plaintiffs sustained damage to the amount claimed."

The defendants simply deny their liability upon any of the grounds alleged. This case is an exemplification of the difficulty of trying cases of this nature without regular pleadings, there being nothing to direct attention to the real issues in the case before the trial, and such issues having to be ascertained during the progress of the case instead of being clearly defined beforehand.

In the present case the plaintiffs, the owners of the *Glenlyon*, seem to be really suing through their Agents, Messrs. Martin, Dyce & Co., for a breach of contract by the defendants in not reporting to them within a reasonable time, the fact that the merchandize referred to in the particulars had been overlanded, and was lying at their wharf.

The *Glenlyon* arrived at the Tanjong Pagar wharf, on the 16th of April, 1876, with cargo for the plaintiffs' agents at Singapore. It was their custom on receiving the manifest to send it either to the Tanjong Pagar Dock Company's office in town, or direct to the wharf for the defendants to copy the manifest into their books, so as to enable them to check the cargo as it entered into their godowns. On the present occasion, Messrs. Martin, Dyce & Co., received the manifest the mail before the arrival of the *Glenlyon*, and sent it down to the wharf, and that manifest seems to have been duly entered into the books kept for the purpose by the defendants. Now there can be no doubt what the object of sending that manifest was, it was to inform the defendants of the cargo that was to be delivered in Singapore, and an intimation to them that any cargo landed from the *Glenlyon*, and not described in that manifest, ought not to have been so landed. This was following the usual course of dealing between the plaintiffs' agents and the defendants, since the former became agents for the Glen line of steamers some years before, and it is very important to ascertain, clearly, what that course of dealing was, because the question to be decided here is whether an implied contract had arisen between the parties out of the previous course of dealing. There was clearly no express contract between them, and I cannot infer from the slight evidence offered upon that point that there was any such invaria-

ble certain and general custom in the matter as would bind the defendants. To use the words of Lord Tenterden, C. J., however, in *Mazette v. Williams*, 1. B. & Ad. 423: "The only difference between an express and implied contract is in the mode of substantiating it. An express contract is proved by an actual agreement, an implied contract by circumstances and the general course of dealing between the parties; but where a contract is once proved, the consequences resulting from the breach of it must be the same, whether it be proved by direct or circumstantial evidence."

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I do not find that the actual landing of the cargo was one of the duties imposed upon the defendants—in fact, the evidence all points the other way, *vis.*, that the landing was effected by the officers of the ship with the assistance of coolies supplied to them for the purpose by the defendants—the duties and responsibilities of the defendants, seem to have commenced from the landing of the cargo from the ship's side on to the wharf.

Upon this point, and as to the course of dealing by the defendants on and after the receipt of the cargo, we have the evidence of Mr. Rose, who was at that time foreman, warehouseman of the Tanjong Pagar Dock Company. He says:—"When a ship comes alongside, the Captain or Chief Officer often asks for coolies and we supply them. They are sent on board the ship, and an officer is put at each hatchway to tally the cargo, and one of the crew is sent down below to point out to the coolies the different port marks and the goods to be landed here. They are then hoisted on to the stage and landed on the wharf. They are then taken charge of by the godown coolies. Each godown has its own coolies. The wharfinger does not take charge of the cargo till it is landed on the wharf." So far as regards the landing and delivering the cargo on to the wharf, and in order to see that they have only got the right cargo delivered, a tally is kept by the defendants of all the goods so received by them, this tally being entered into what is called an Index-book. Thus they have two books, one being the book into which the manifest is copied, and which shows them what goods they ought to have received, and another the Index-book which shows them what goods they actually have received.

In the manifest sent down by Messrs. Martin, Dyce and Co., and which was copied into the defendants' books for the purposes before mentioned, all the cargo to be landed in Singapore was distinctly specified, and also all the cargo which was to be landed in Singapore for transhipment to other ports. The manifest included goods to be landed in Singapore for transhipment to Hongkong, Samarang, Brisbane and Macassar,—it did not include the goods, now in question which are marked L. R., bore the Manila portmark, and were intended to have been landed in Hongkong for transhipment to Manila, and were in effect landed here by mistake. It is obvious that by looking at the manifest book and then at the Index-book, the defendants could have perceived at once that they had taken cargo into their godowns on the 16th April, which was not intended to have been landed at Singapore. As to what

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was next to be done according to the usual course of dealing between the parties, Mr. Rose tells us in his cross-examination by Mr. Bond, "the manifest was copied into our books. We take our Index-book with the manifest-book, and see if they agree. It is a long time ago, I don't remember if they agreed. If they don't agree we send down a memo. to the Agents, of the points in difference. The Index-book indicates all that has been received from the ship—there is an Index-book to each godown. These goods must have been therefore, in the Index-book. As a rule, we compared the manifest with the Index-books. I don't recollect having done so on this occasion—if I had done so I should probably have found that cargo had been landed here which ought not to have been landed. If I had found that we had cargo which should not have been landed here, I would have reported. I knew from what vessel the goods had been landed. I saw the cargo marked "Manila" for transshipment, and that was quite sufficient for me."

The next feature of the transaction relates to the "Return" which, in the ordinary course of business, was sent to Messrs. Martin, Dyce & Co., by the defendants, a fortnight after the landing of the cargo. Upon this point Captain Smith says: "We have adopted the custom for convenience sake of sending returns to the agents of the ship. We generally put in those that are chafed, damaged, short landed, or over-landed, anything that will be useful to the agents. We do not profess to put transhipped cargo at all—we do, as a point of fact, send up these memos."

In cross-examination, however, Captain Smith somewhat qualified his previous statement by saying: "We sometimes put transhipped cargoes in our returns—any that requires particular attention." Mr. Campbell [of the firm of Martin, Dyce & Co.] says, that if cargo is overlanded, they expect the defendants to let them know as soon as possible. They have no other means whatever of finding that out, unless from the defendants. If goods meant for transshipment and not in the manifest are landed, they ought, he says, to be returned as 'overlanded.' If they are in the manifest and not landed they ought to be returned as "short landed," and for doing all this, he says, defendants receive payment according to a fixed scale of wharfage and coolie-hire. It is clear, therefore, that this sending in of the return, whether a custom adopted for convenience or for any other purpose, was a mode of dealing established between the parties, and one upon which the plaintiffs' agents were accustomed to rely for the conduct of their business. The return which was sent in upon this occasion and which was headed—"Memo. of cargo landed Ex S. S. *Glenlyon* from London" contained the marks and numbers of such cargo as was "Broken," "Damaged," "Chafed," "Short landed" and "Overlanded." It contained no entry of the particular goods in question, which had then been lying for a fortnight in the Company's godown, and no notice of its being there was sent to Messrs. Martin, Dyce & Co., until the 11th of November, 1876, when a memo. of goods lying in the defendant's godown sub-

ject to rent, was sent to the plaintiffs, and amongst them were included the goods which had been lying there since the 16th of April, and respecting which, the present action is brought. Messrs. Martin, Dyce & Co., had had enquiries made respecting their missing goods from their correspondents in Manila on the 21st August, and the shipping clerk says that he went down to the wharf the day after that letter was received to make enquiries. He says that he spoke to Mr. Rose, the warehouseman, and asked him if the goods marked L. R. had been landed, giving him the numbers and marks, and Mr. Rose said they had not been landed. He says that he saw Mr. Rose again on the 18th September and again asked whether those goods had been landed in Singapore, and Mr. Rose told him they were not. Mr. Rose flatly contradicts the shipping clerk upon this point, but with a number of other matters to attend to, and no particular reason, perhaps, for recollecting this, it is quite possible that it may have escaped his memory. The shipping clerk, however, could hardly be mistaken upon such a matter. It is almost a certainty that Messrs. Martin, Dyce & Co., on receipt of their letter of the 21st August from Manila, would send to make enquiries of the defendants as to the missing goods, and the shipping-clerk would be the proper person to make such enquiries. From the general course of dealing between the parties—the sending down the manifest to the defendants, the copying of the manifest by the defendants into their books, the keeping of the Index-book, and the sending the Returns for the purposes mentioned by Captain Smith and Mr. Campbell to the plaintiffs' agents, I infer that there was a duty, arising *ex contractu* cast upon the defendants to report within a reasonable time as to "overlanded" cargo to the plaintiffs' agents. Captain Smith in his re-examination says that as regards transshipment goods, if they are not mentioned in the manifest, he should pay no attention to the manifest—the manifest are often erroneous: "If goods concerning which no mention is made in the manifest are landed, we should hold them until a shipping-order was sent us by the consignees of the vessel. It would not occur to us to give any special notice because it so frequently happens." But then, if that is so, what is the use of the manifest at all? If it is not to be relied upon, why do they enter it into their books? What is the Index-book kept for, and why do they send a Return which, under these circumstances, would be more likely to mislead than to guide? When the plaintiff's agents received that Return of the 30th of April, with no entry under the 'overlanded' column, it was tantamount to a statement that no goods had been overlanded; and I can see no reason why transshipment goods should be treated in a different manner from other goods. All the goods intended for transshipment and to be landed here, were distinctly specified in the manifest, and the fact that these goods were not mentioned therein, was a distinct intimation to the defendants that they were not to be landed here. They could see at a glance by comparing their manifest book with the Index-book that these goods had been overlanded, whether they were intended for transshipment or not, and

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SIDGEBAYES, yet by sending in a Return a fortnight afterwards, they leave the plaintiffs' Agents to suppose that no goods whether for transhipment or not, had been overlanded. Even if it were not their custom to take any notice of overlanded goods meant for transhipment, there is no evidence whatever that they informed the plaintiffs' Agents of that fact—on the contrary, by their acceptance of the manifest and the sending in the Return, they led the plaintiffs' agents to suppose that such a return could be entirely depended upon. There is nothing in the printed regulations issued by the Tanjong Pagar Dock Company, inconsistent with such an implied contract, as I have gathered from circumstances, and the general course of dealing between the parties.

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1878.
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Co.

As regards the other point that was relied upon by Mr. Davidson, viz., that the plaintiffs themselves had been guilty of negligence, and that the doctrine of contributory negligence applied, I think, that even if such negligence had been proved much more clearly than it was, the defendants would not have been thereby excused. The case of *Radley v. London and North Western Railway Co.*, 1 L. R. App. Cases, p. 754, quoted by Mr. Bond, establishes the proposition that though a plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident which is the subject of the action, yet, if the defendant could, in the result by the exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse him. The defendants in this case could, easily by the exercise of ordinary care and diligence, have avoided the mischief which happened, and as they have not exercised it, they are liable to the plaintiffs for the damages occasioned thereby. There will, therefore, be judgment for plaintiffs with costs.

YAHAYAH MERICAN v. KHOO HOCK LEONG & ORS.

PENANG.
WOOD, J.
1878.

The Court will, at the suit of a private neighbour, restrain, by perpetual injunction, the performance of a Wyang or Chinese Theatre in a house adjoining his, so as not to be a nuisance to him.

July 29.

This was a suit to restrain the performance of a Chinese Wyang next the plaintiff's house, as being a noisy nuisance. The evidence shewed clearly that the performances were very noisy, so much so that in the plaintiff's house, one could hardly sleep, or be heard talking in an ordinary tone. An interim injunction had been granted.

Van Someren, for plaintiff.

Ross, for defendants.

Wood, J. On the principles recognised in *Walker v. Brewster*, 5 L. R. Eq. 25 and *Inchbald v. Robinson*, 4 L. R. Ch. Appeals, 388, cited for the plaintiff, I hold that the complaint made in this bill, as to noises made by the performers at the Wyang, are a nuisance, as interfering with the ordinary enjoyment by the plaintiff of his

house, more especially as regards conversation and sleep therein—and I decree accordingly in the general terms given in *Walker v. Brewster*, 5 L. R., Eq. 34, leaving the matter of special nuisance to be proved, on an application to commit.

WOOD, J.
1878.

YAHAYAH
MERICAN
v.

KHOO HOCK
LEONG & ORS.

Perpetual injunction decreed.

SHEDEMBRUM CHETTY v. SHAGAPAH CHETTY.

The Court will not stay an action on a covenant in a mortgage bond, until after the hearing of an equity suit, brought by the defendant against the plaintiff, to have such bond cancelled, as having been obtained by fraud (a)

PENANG.

WOOD, J.
1878.

October 15.

Clarke, for the defendant had obtained a Rule to shew cause, why the proceedings in this action should not be stayed until after the hearing of an equity suit between the same parties. It appeared that the present action was brought on a covenant in a mortgage bond, for the balance of the money thereby secured, after deducting the nett proceeds of the property mortgaged and sold by plaintiff under the bond. The defendant had commenced a suit in equity to have the bond cancelled as having been obtained through fraud.

Van Someren, for plaintiff, shewed cause and cited *Pearce v. Robins*, 26 L. J. Ex. 183 [N. S.] as being precisely in point—and cases cited in 2 Arch. Practice p. 1370 [11th ed.] 1870.

Clarke, in support of the Rule.

Wood, J. The Rule must be discharged.

LETCHMAN CHETTY v. NARAINAN CHETTY.

Where an agreement is made for the re-payment of money on the arrival of a certain ship at a certain port, and the voyage the vessel is to pursue, is clearly pointed out,

Held, her arrival at that port was a condition precedent; and no re-payment could be required, although the vessel was unable through stress of weather and bankruptcy of her owner, to complete the voyage.

Such vessel having been sold on the bankruptcy of her owner, and the purchaser having repaired and re-fitted her, and sent her on his own account to the same port as that mentioned in the aforesaid agreement, but by a different route,

Held, the arrival of the vessel at such port, on such second voyage, was not a performance of the condition mentioned in the agreement, as it was a new voyage, and not the one contemplated by the agreement.

PENANG.

WOOD, J.
1878.

October 21.

This was an action to recover \$1,906.42 due on an agreement of conditional loan. The agreement was between the plaintiff and defendant at Penang, and was in the Tamil language, and, as translated, read as follows:—"On the 8th day of the month of Panguine, "in the year Yaswaree, corresponding to the 19th day of March, "1878, the sum of \$3,600 on premium, is due to Nawana Muna, of "Penang, by the firm of Seena Thana Shawana, being the amount "received on the insurance of two vessels named "Mainrasee," "belonging to Shayna Muna Shayna, and the red vessel

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1878.

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"Mahomed Bundar Sultanee," belonging to Suna Luna Nagattu "Merican of Porto Novo, on a single mariner's risk, to sail to Acheen, and from thence to Nagore or Negapatam. For the said sum of dollars three-thousand six-hundred, the said vessel shall set sail, proceed from hence, and safely arrive into Acheen; there take in betel nut and goods, set sail, and sail again safely to the port of Nagore or Negapatam. On receiving instructions of the safe arrival of the said vessel, and the landing of the betel nut and goods, within three months from this date, then the said sum of \$3,600—with premium, at the rate of $1\frac{1}{2}$ and $\frac{1}{2}$ per cent. per month, shall be paid as follows: \$1,800 with premium towards the "Mainrasee" and \$1,800 with premium towards the Red Barque, and will take back this paper bearing premium. In case the vessels arrive there, and information of the same does not reach here above 3 months, then the principal and premium shall be paid for the excess days. [Sd.] Seena Thana Shawana Narainan Chetty. The risk of Shayna Muna Shayna's ship is on itself, and the red ship the risk is on the cargo, inclusive of the boat while discharging cargo. [Sd.] Narainan Chetty."—"Nawana Muna" was the plaintiff's firm and "Seena Thana Shawana," the defendant's. It appeared that the defendant had become the underwriter, and insured the hull of the ship "Mainrasee" [properly named "Mariner's Hope,"] and the cargo only on board the barque "Mahomed Bundar Sultanee," and in order to protect himself, had insured himself with the plaintiff's firm. The Chetties' usual way of dealing in insurance matters was, to advance the money insured for, and to get repayment thereof subject to the risk. The "Mahomed Bundar Sultanee" arrived safely at Nagore, having performed her intended voyage; and the plaintiff was paid by the defendant the \$1,800, and premium due therefor. The "Mainrasee" or "Mariner's Hope" got to Acheen, loaded betel nut and other cargo, and was on her way to Negapatam, when having met very bad weather, she sprung a leak, and was otherwise disabled, and had to put back into Penang on the 28th July, 1878. The present action was brought to recover the \$1,800 and premium alleged to be due on this vessel, as the three months had elapsed. At the time of the commencement of this action, in fact, up to the time of trial, neither the "Mainrasee" nor her cargo had reached Negapatam or Nagore. On her putting back into this port as aforesaid, her owner became bankrupt, and she was sold by the mortgagee [the defendant's firm] and fetched much below the amount she was mortgaged and insured for. Her cargo was greatly damaged, and was sold here for the benefit of the shippers thereof. These facts appearing from the pleadings, and admission of the parties at the trial.

Ross, for plaintiff contended that the agreement was a Bottomry Bond, and as there had not been a total loss, the plaintiff was entitled to recover. *Marshall on Insurance*—575 [4th ed.] *Thompson v. Royal Exchange & Insurance Co.*, 1 M. & S. 30, *Castle v. Playford*, 7 L. R. Ex. 98, reversing 5 L. R. Ex. 165.

Van Someren, for defendant contended the agreement was not a Bottomry Bond at all. It was one for a conditional re-payment

of money, which condition, through no default of the defendant, had not been performed, and cited *Palmer v. Pratt*, 2 Bing. 185.

Wood, J. held, that the arrival at Nagore or Negapatam was a condition precedent, that as the condition had not been performed through no fault of the defendant, the action was premature, and non-suited the plaintiff with costs.

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1878.

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CHETTY.

The plaintiff having brought a second action for the same claim, such second action came on to be heard on the 24th June, 1880, before *Ford, J.*

Besides the above, the following further facts appeared from the pleadings and admission of parties. The "Mainrasee" or "Mariner's Hope" had been sold at public auction by the mortgagee, as aforesaid, and was purchased by one Anamalay Chetty, for the defendant's firm of Seena Thana Shawana. That the defendant's firm repaired and re-fitted the vessel, procured fresh cargo, on freight, from a new set of shippers, and had proceeded direct to Negapatam, where she arrived on the 18th February, 1879. The voyage was entirely for the defendant's firm's benefit, and not merely his as an underwriter or insurer. He had not re-insured the vessel for this voyage to plaintiff, and had paid plaintiff no premium since the date of the original agreement. On these facts,

Ross [E. W. *Presgrave* with him] for plaintiff contended, that the arrival at Negapatam on the original voyage, was not a condition precedent, and cited *Castle v. Playford*, 5 L. R. Ex. 165, reversed on Appeal 7 L. R. Ex. 98, and if it were, at all events, the subsequent arrival of the vessel, was a performance of the condition, and the money was now payable.

Van Someren, for defendant submitted, that the document was somewhat ambiguous, but the construction to be put on it was, that it was a voyage and a time policy in one—such a policy could be effected—*Gamble v. Ocean Marine Insurance Company*, 1 L. R. Ex. Div. p. 8, on appeal 1 L. R. Ex. Div. p. 141. That as regarded the time, the vessel was disabled within the period, and incapable of performing her voyage. That the arrival of the vessel on the first voyage was a condition precedent. *Palmer v. Pratt*, 2 Bing 185, the contract was that if the vessel, through any but fraudulent causes, did not reach Negapatam within 3 months, the money was not to be returnable. As regarded the voyage, he further contended that the subsequent arrival of the vessel at that port was not a performance of the original condition. She arrived there on a second voyage, which was not a continuation of the old but a new voyage. *Wooldridge v. Boydell*, 1 Douglas 16, *Bottomley v. Bovill*, 5 B. & C. 210 and *Way v. Modigliani*, 2 T. R. 30—that the old voyage was from Penang to Negapatam *via* Acheen, and was broken on the way from Acheen to Negapatam. The subsequent voyage was a new voyage from Penang to Negapatam direct, and the vessel was then laden with absolutely new cargo, in fact, it was not the voyage intended, or what the under-writers meant to insure by the agree-

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ment sued on—that no fraud being alleged against defendant, the plaintiff was not entitled to recover.

Ross, in reply contended, that the agreement was a mere contract to pay a certain sum of money on arrival of the vessel at Negapatam. It was not a contract of insurance, and whether the voyage was a new one or not, the money was now payable.

Ford, J. held that judgment must be for the defendant, on the ground that the voyage in which the vessel had arrived at Negapatam, was not the one contemplated by the contract of insurance.

Judgment for defendant with costs.

TAN KIM KENG v. MUNICIPAL COMMISSIONERS.

PEMANG.

WOOD, J.
1878.

November 1.

The notice to be given under section 126 of the Conservancy Act 14 of 1856, must state the name and address of the intended plaintiff and his solicitor; it must state the time and place where the trespasses complained of, took place; and that an action is intended to be brought, otherwise the same will be bad and treated as no notice to the Commissioners.

A notice headed "Notice of Action," but not otherwise, intimating an action would be brought, is sufficient.

This was an action to recover damages for obstructing a water course. The defendants, among other things, pleaded that no notice of action as required by section 126 of the Conservancy Act 14 of 1856, had been given. The section is as follows:—

"No writ or process shall be issued out against, or served upon the Commissioners or any of their officers, or any person acting under the direction of the Commissioners, for anything done or intended to be done, under the powers of this Act, until the expiration of one month next after notice in writing shall have been delivered or left at the office of the Commissioners, or at the place of abode of such person explicitly stating the cause of action, and the name and place of abode of the intended plaintiff, and of his attorney, or agent in the cause; and upon the trial of any such action, the plaintiff shall not be permitted to go into evidence of any cause of action except such as is stated in the notice so delivered, and unless such notice be proved, the Court shall find for the defendant."

Clarke, for plaintiff, put in a notice served on the defendants' Secretary, but which did not give the address of the plaintiff or his solicitor, as required by the section. He also put in a further notice, which was served on the Secretary, which supplied these particulars, but, except that it was headed "Notice of Action," did not intimate that an action would be brought.

Ross, for defendants, contended both notices were bad—the first as it omitted the address, and the second as it did not state that an action would be brought. He relied on *Lovelace v. Curry*, 7 T. R. 631, *Mason v. Birkenhead Commissioners*, 6 H. & N. 72, S. C. 29, L. J. Ex. 407—the second notice was also bad, for it did not state time and place. *Martins v. Upcher & another*,³ Q. B. 662, *Breeze v. Jordein*, 4 Q. B. 585, S. C. 12 L. J. Q. B. [N. S.] 234. The first notice is void, and the second notice fur-

ther, avoids or waives the first. The Commissioners could not act on the second notice, for they would not, with certainty, know what to do. It is also void for the grounds above stated as not stating the time and place where the act was committed, not giving intimation of the action, and not giving the name and address of the attending parties to the action.

Clarke, for the plaintiff. The notice in question, No. 2, is good, as it is headed "Notice of Action."

Wood, J. I consider the case of *Mason v. Birkenhead Commissioners*, 29 L. J. Ex. [N. S.] 407, is decisive on the point, that notice of the intention to bring this action not being given in either notice, each notice is bad.

Plaintiff non-suited.

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1878.

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KENG

v.
MUNICIPAL
COMMS.

RAMSAMY v. NARAINEN CHETTY.

Where a party recovers judgment in the Court of Requests with costs, and a large portion of his costs are disallowed on the ground that such costs are beyond the Court's jurisdiction and practice to allow, no action lies in the Supreme Court for such extra costs.

The judgment of the Court of Requests is final; and except as is provided by section 12 of the Appeals Ordinance IX. of 1874, cannot be reviewed by, or sued on, in this Court.

Query.—Whether the Court of Requests has power to allow a successful party costs incurred by him for witnesses' expenses, Solicitors or Counsels' fees, carriage hire and the like?

PENANG.

WOOD, J.
1878.

December 16.

This was an action to recover \$113.90 for costs incurred by the plaintiff in defending an action in the Court of Requests, brought by the now defendant, and which was decided in his, [the now plaintiff's] favour. The Commissioner of the Court of Requests while deciding in the now plaintiff's favour, considered he had no power to award him costs beyond the scale allowed by the practice in that Court, and suggested that the plaintiff had his remedy for such costs by suing in this Court. This action was then brought.

Anthony, for defendant submitted that the action did not lie, and cited *Austin v. Mills*, 23 L. J. Exch., [N. S.] p. 40.

The plaintiff appeared in person.

Wood, J. I consider that by the Court of Requests Act 29 of 1866, and section 12 of Ordinance 9 of 1874, the Court of Requests judgment in this matter is final, except the party dissatisfied, makes application to this Court to call for the proceedings of the Court of Requests, and asks for a rehearing, or in some way to set right the matter under the latter enactment, so as to "secure substantial justice between the parties."

Mr. H. C. Vaughan, the acting Registrar, then stated that some communication had taken place between himself and the Commissioner of the Court of Requests about this matter—that the Commissioner of the Court of Requests had told him [which *Mr. Anthony* agreed to as being correct]—that the only costs allowed, as matter of practice, by the Court of Requests, were

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merely the Court fees,—leaving the parties to bear the actual expenses of their witnesses, counsel, and incidental expenses of carriage hire and so forth—that the Commissioner considered himself powerless to allow the present costs which were of that nature, except the matter were decided by adequate authority to the contrary—and he was desirous for a decision on this point.

Wood, J. I consider I am unable to decide that question in this Court, on such a plaint as the present—the matter is practically an appeal against the judgment of the Court of Requests, which must be brought before me in accordance with the provisions of the section 12 of Ordinance 9 of 1874 already referred to. I think that according to the stated practice, grave injustice is done to the plaintiff, or any person in whose favor a judgment is given, but I strongly incline to the opinion, that as costs can only be given by Statute, there is no action for costs, [except they be given by Statute] at common law—and that there is no remedy, however great the injustice, for a person who is not allowed his reasonable and necessary costs of defending or maintaining an action.

Judgment for defendant.

SEE BONG LIM & ANOR. v. KAM BENG CHAN.

PENANG.

WOOD, J.
1878.

December 17

An attorney or agent has no power to substitute another for himself, where the original power of attorney gives him no power to do so: the nominee of the attorney, under such circumstances, has therefore no right to sue in the name of the original principal.

A letter from one person to another, directing the latter to demand or sue a third party, is a sufficient power to enable the latter to sue such third party in the name of the writer.

The limitation applicable to a claim for hire or freight of a junk, under a charter-party which is in writing, but not under seal, is six years, under clause 16, section 1. of Act 14 of 1859.

If a plaintiff recover in the Supreme Court a sum within the jurisdiction of the Court of Requests, he will—unless there are special circumstances to justify his suing in the Supreme Court—be allowed his costs only, according to the scale and practice of the Court of Requests.

This was an action for freight of the junk “Mah Glay”—a seagoing boat of 50 tons burden. The defendant among other things pleaded, that the plaintiff’s cause of action did not *accrue* within three years next before action. The action was brought by one Koh Twah, who claimed to be the substituted Attorney of one Tan Puan, who was the attorney of the plaintiff, See Bong Lim. It did not appear that the original power of attorney from plaintiff to Tan Puan, gave Tan Puan power of substitution.

Anthony, for the defendant, objected that Koh Twah, who was called and produced the substituted power of attorney, was not authorized in bringing the action.

Duke, for plaintiff—*contra*.

Wood, J. I am of opinion that if the original power of attorney does not name the witness as attorney, and no power was given therein to substitute another attorney, that document did not empower the witness to sue.

It subsequently appeared that the said Koh Twah also brought this action, because the plaintiff personally, had written to him from Singapore, to demand payment of defendant. He produced the letter.

Anthony, submitted that that did not confer a right to sue.

Wood, J. held that the letter was a sufficient power.

Anthony, then relied on the Statute of Limitation. He admitted that the action was brought on a charter-party, not under seal, for the charter of the junk, for two months, at \$28 per month—but contended that as the charter-party was dated 12th February, 1874, and the summons was taken out only on 22nd November, 1878, more than three years after, the claim was barred.

Duke, contra.

Wood, J. I am of opinion that the charter-party being in writing, not under seal, the case comes within clause 16, section 1. of the Indian Act of Limitation 14 of 1859, and that six years is the period.

December 19. *Anthony*, for defendant, now asked leave to call the attention of the Court to *Thompson on Limitation*, p. 129, citing 9 Weekly Reporter, Civil Rulings, p. 193, Sir B. Peacock delivering judgment of full Court of Appeal, *ibid* 195, on the point of limitation.

Duke, for plaintiff contended, that a junk was not a boat within the meaning of the Act—the junk being a small ship impelled by sails, of 52 tons burden, decked, and intended as its charter-party shewed, for voyages beyond the port of Penang—whereas a boat was a vessel ordinarily impelled by oars, though occasionally by sails.

[*Wood, J.* I am still of opinion that the 6 years limitation must prevail.]

The case proceeded and eventually terminated in the plaintiff's favour, in the sum of \$9.69 only.

Anthony asked that as the plaintiff had recovered an amount within the jurisdiction of the Court of Requests, his costs should be allowed him only according to the scale and practice of that Court.

Wood, J. The verdict will be for the plaintiff, with costs as in the Court of Requests.

ATTORNEY-GENERAL v. GREGORY ANTHONY.

The provisions of section 37 of the Court's Ordinance 5 of 1873, are imperative on every Solicitor to take out his annual certificate, and as no remedy is provided by the Ordinance for the non-observance of this section, and the Crown has a pecuniary interest thereunder, by reason of the Stamp Duty imposed, the Attorney-General may sue for same, under the Crown Suits Ordinance 15 of 1876.

PENANG.

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1878.

December 21.

This was a proceeding under the Crown Suits Ordinance 15 of 1876, and was brought as a test action to decide certain questions pending between the Government and the Penang Bar, as to

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the latter's liability to pay their license, under the Court's Ordinance 5 of 1873.

D. Logan [*Solicitor-General*] for the Crown. Previous to coming into operation of Ordinance 5 of 1873, no fee was payable yearly by advocates and attornies, but, for the first time, by section 37 of this Ordinance, it is enacted that: "Every practising Advocate and Attorney of the Supreme Court, so long as his name remains on the roll of advocates and attornies, shall, within the first seven days of every year, take out a certificate to practice as an Attorney of the Supreme Court." Up to the present time, until this year, the practitioners have taken out their yearly certificates. By section 42 of the Ordinance in question, a penalty is imposed. The argument on behalf of the Bar is, that the disability mentioned in section 42, is the only penalty or disadvantage imposed by the Act, and that the language of the Statute does not impose any duty or obligation. There is no money penalty imposed by the Act. He referred to *Holgate v. Slight*, 21 L. J. Q. B. 74 as bearing on the point.

Van Someren, for defendant. The argument on behalf of defendant is, that the Act does not prescribe a duty, but simply enacts that if a person does not take out a certificate, he shall not be able to maintain an action for his fees. No obligation exists on the Bar to take out such a certificate, and no duty being imposed, no debt has been incurred. The old Act 37 Geo. III., c. 90, sections 30 and 31, and the 6 and 7 Vic. c. 73, section 102, are the English Statutes from which our Act is taken. This section 102, corresponds with section 40 of our Act, but no case can be found where a Solicitor has been held liable to the Crown for not taking out his certificate. Section 34 of our Ordinance preserves the status of an attorney, and the words in sections 37 and 40 "shall" are not imperative. *King v. Inhabitants of Birmingham*, 8 B. & C. 29, 34. If imperative, it is only enforceable by the means provided in section 40.

[Wood, J. I may call your attention to *Shepherd v. Hill*, 11 Ex. 55, s. c. 25 L. J. N. S. Ex. 6, and *Reg. v. George Buchanan*, 8 Q. B. 883, cited in *Maxwell on Statutes* p. 365.]

Here the Ordinance distinctly prescribed a remedy, which is its own peculiar remedy, and therefore the only one, viz., the disability to bring an action for fees-section 42.

Wood, J. On this case, according to the authorities specifically referred to in *Maxwell on Statutes* 367, 370, more particularly the cases of *Shepherd v. Hill*, 25 L. J. Ex. 6, s. c. 11 Ex. 55, as commented on and explained in *The Vestry of St. Pancras v. Battersly*, 2 C. B. N. S. 477, s. c. 26 L. J. C. P. 246, the judgment must be for the Crown. I have no doubt, that the words of section 37 impose upon every practising advocate, the duty of taking out a certificate; which, as it involves the payment of \$50 for stamp, gives the Crown a direct pecuniary interest in the performance of this duty. The subsequent section 42 only imposes upon the advocate not taking out his certificate, a disability in that he cannot sue for his costs in an action against his client, but there is no remedy given by the Ordinance, which covers or indeed at all affects

the right conferred on the crown by section 37. The duty being imposed, and the crown having an interest in the matter, the Attorney-General may enforce it, under the Crown Suits Ordinance, by suing for the stamp which is unpaid.

WOOD, J.
1878.

ATTORNEY-
GENERAL
v.
ANTHONY.

Judgment for plaintiff.

LIM MAH YONG v. J. A. ANTHONY & ORS.

A testatrix directed that in the event of the plaintiff not wishing to live in a certain family house provided by her, he and his family should be allowed to occupy free of rent, for 40 years, certain other premises, after which period, these latter premises were to be his or his heirs or assigns, but neither he, nor they, were allowed to mortgage or sell the same.

Held, the plaintiff and his family had only a license to live in the house, and that a personal occupation was required.

The Court, however, declined to express an opinion as to who all the word "family" included, considering that it would be premature to do so.

PENANG.

WOOD, J.
1879.

January 14.

This was a suit to restrain the defendants, Receivers of the estate of Oh Yeo Neo, deceased, from selling premises No. 424, Beach Street, which was devised by the 7th clause of the Will of the said Oh Yeo Neo as follows:—"In the event of the said Lim Mah Yong not wishing to live in the family house hereinbefore mentioned, he and his family should be allowed to occupy the premises No. 424, Beach Street, free of rent, for a period of 40 years from the day of my death, and thereafter the said house should become his property or that of his heirs or assigns, but neither he nor they should be allowed to sell or mortgage the same." The defendants considered the gift to the "family" to occupy, was void, and as regarded the plaintiff, a personal occupation was intended. The gift over, after the 40 years, had been already held void by this Court. [a]

Ross, for plaintiff. The use of the word "occupy" gives an estate for life—here it is limited to 40 years, but there is no obligation of personal occupation of the house for that period. *Regina v. Inhabitants of Ealington*, 4 T. R. 177; *Whittam v. Lamb*, 12 M. & W. 813; *Rabbitt v. Squire*, 24 L. J. ch. N. S. 203.

Van Someren, for defendants. There is no real contention, but the decision of the Court is sought for guidance of the receivers.

1st.—The clause confers only a license as was held by the Court, see Sir W. Hackett's judgment *Ong Cheng Neo v. Yeap Cheah Neo*, Straits Law Reports p. 320. [a] "Family" is indefinite, *Ibid* p. 580, on appeal, 6 L. R. P. C. 381, *Hawkins on Wills*, p. 89—but it is sought to obtain the decision of the Court as to its meaning. *2ndly* "Family" is *prima facie* "children." *Snow v. Tweed*, 9 L. R. Eq. 622; *Lambe v. Emes*, 10 L. R. Eq. 267; on appeal, 6 L. R. ch. App. 597.

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1879.

LIM MAH
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& ORS.

The clause is either void as regards the "family," though not as regards the plaintiff, or "family" must mean children, not including collaterals or adopted children.

3rdly.—Personal occupation by the plaintiff is required. Straits Law Reports, p. 358, *Maclaren v. Stainton*, 29, L. J. Ch. N. S. 442; *Rabbitt v. Squire*, *supra*.

Ross, in reply.

Wood, J.—Looking at the whole of the 7th clause of this Will, reference being had also to the 1st clause thereof, which speaks of the family house thereby provided, I am of opinion, personal occupation was intended, and that the Will conveyed only a license to the plaintiff to occupy, and not an equitable estate for years.

The testatrix by clause 1, obviously refers to a residence of the family in the house devised, and the terms "live in the house," give meaning to the words "be allowed to occupy," which follow: and the words which import that after the term of forty years the property is to be "his property, or that of his family," imply that before the expiration of that term, no estate which is equivalent to property, shall vest in him.

I consider that the use of the word "family" does not violate the bequest, but in dealing with the word "family," any expression of the Court as to the meaning of the word, would be *obiter dictum*, not arising in this case, and I should desire to guard myself against defining "family," until a case may arise in which the point is really in issue.

It is obvious, that in the case of collaterals or adopted children, questions of difficulty might arise, and it is desirable that these interests should be represented, and their rights supported by well considered arguments.

It is sufficient for the purposes of this case, for me to adjudge that the testatrix has given to the plaintiff, Lim Ah Yong and his "family," a license to occupy; or in other words, a right to personal occupation for the term of forty years.

July 15. On a difference arising between the parties, on the drawing of the decree, the Court this day directed that the words, "and not by his or their agents, licensees or tenants," should be inserted between the words "personally," and "occupy." Costs of all parties to come out of the estate.

RAHMAN CHETTY v. & McINTYRE & ORS.

PENANG.

WOOD, J.
1879.

January 17.

Where it appeared that the plaintiff was unable to serve a writ of summons on a defendant out of the jurisdiction, owing to the great expense which would necessarily be attendant thereon, without a likelihood of his being repaid—the Court ordered a renewal of the writ, although it was not stated that the claim was not barred by Limitation.

Inability to serve a writ of summons, owing to pecuniary reasons, is a "good reason" within the meaning of section 44, Ordinance 5 of 1878.

Doyle v. Kaufmann [3 L. R. Q. B. Div. 7 & 340] distinguished.

This was an action to recover \$4,500 for money lent, &c. The writ of summons was issued on the 7th December, 1877, and

sequestration of defendants' property was granted the same day.

Thomas, for plaintiff now moved, under section 44 of Ordinance 5 of 1878, [a] for a renewal of the writ of summons, and of writ of sequestration, against the defendants, A. McIntyre, C. McIntyre and C. Fyleberg—three of the defendants who had not yet been served. The affidavits he moved on stated that the cause of action arose here—that all the defendants, save and except the three abovenamed, had been served—and the reason for their not being served was, that they were residents of Sumatra, and it would require leave of the Court and a special bailiff to do so, which would necessitate expense—that as the defendants had no property here, and a judgment of this Court would not be likely to be enforced at Sumatra, the plaintiff had had no wish to incur expense in suing those defendants, without a likelihood of reimbursing himself out of their property; but now that some of their property had come within the jurisdiction, he was desirous of sequestering this, and serving them with the summons, and proceeding to final judgment.

Wood, J. I allow the application—I have, however, some doubts in the matter. It is certain that the plaintiff might have served the defendants, but for the expense and difficulties attending such proceedings, but as the Act allows me to renew the writ “for other good reason”—such as I presume the practical difficulties in the way, to be—I make the order. It seems to me that much mischief and injustice might result from renewing a summons which had expired, and so keeping alive an action which was barred by the Statute of Limitations—and inasmuch as the affidavits are silent on this point, it might be fairly inferred that the debts were incurred more than three years ago, and so a new summons would be too late; but I think this view is not necessary for the Court to consider. The defence of the Statute of Limitations might never be made by the defendants even to the action, and the defendants also might move to set aside the order of renewal, on the ground that the Court should not so renew the writ where service might have been and was not affected, even although it was most inconvenient for the plaintiff to do so, and the other “good reasons” might be *accident* and not *neglect*, even for pecuniary reasons. The late case of *Doyle v. Kaufmann*, [3 Q. B. Div. 7 & 340], is opposed to this—but there, there were no “other good reasons,” and it may be taken the plaintiff wilfully did not serve the writ, without any extenuating circumstances, such as there are here. I consider that the Statute of Limitations, being a statutable defence somewhat *contra bonos mores* when

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[a] The Section is as follows: “No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Court for leave to renew the writ; and the Court, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal, and so from time to time during the currency of the renewed writ.”

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applied to mercantile transactions—is a defence pleadable, or not, at the will of the defendant; and does not make a debt *ipso facto*, void. See *Bailey v. Owen*, 9. W. R. 128; and *Nayer v. Wade*, 31 L. J. Q. B. 1. I incline to think therefore that there is a difference in this case, from the points decided in *Doyle v. Kaufmann*—that the absence of the defendants in a place like Sumatra, is a “good reason” for not serving, on the score of expense—and there is this further point, that the action has been all along kept up against the other defendants, against whom a judgment would certainly be obtained, if for a good cause of action.

Order accordingly.

TAN KIM KENG & ANOR v. MUNICIPAL
COMMISSIONERS.

PENANG.
—
WOOD, J.
1879.
—
August 19.

A notice under section 126 of the Conservancy Act 14 of 1856, which states that the defendants had, in a certain month, obstructed the plaintiff's watercourse, and thereby had prevented the water flowing to the plaintiff's mill, by reason of which he had to give up working his mill, sufficiently implies that it is a continuing trespass, so as to enable the plaintiff to proceed, although the obstruction was put up a long while before.

A person acquires no easement or right to the flow of water, which runs in an artificial course, although such course may be connected with a natural stream, the water of which flows into the artificial course.

This was an action for obstruction to plaintiffs' flow of water. The defendants among other things pleaded: 1. That no notice in writing was given under Indian Act XIV. of 1856. 2. That the act complained of was not committed within 3 months after accrual of the alleged cause of action.

Van Someren put in the notice which was dated 20th November, 1878, and which stated that in March, 1878, the defendants had obstructed the plaintiffs' watercourse, and had prevented the water of the stream flowing to the plaintiffs' mill and had thereby compelled them to stop working their mill—the action was commenced on 13th February, 1879. He contended that the statement of claim and notice, sufficiently shewed that the act complained of was a continuing act, which existed up to the time of the commencement of the action, though occasioned by the building of a brick drain of pipes, &c., long before this.

Ross, in support of defence. The notice is not distinct in saying this is a continuing injury, but the statement of time is essential. *Martin v. Upsher*, 11 L. J. Q. B. [N. S.] 291, which was followed by *Breeze v. Jordein*, 12 L. J. [N. S.] Q. B. 234.

Wood, J. I am of opinion that the notice and statement of claim sufficiently describe the cause of action as a continuing trespass. The plea on this point will be over-ruled.

December 16. The case now came on before *Ford J.* on the merits. It appeared that the watercourse which supplied the

plaintiffs' mill was an artificial course, but was connected with a natural stream.

Van Someren [E. W. Presgrave with him] for plaintiffs submitted, that the artificial course being connected with the natural stream, the same must be treated as a natural water course, and the plaintiffs could maintain their action. They relied on *Sutcliffe v. Booth*, 32. L. J. Q. B. [N. S.] 136; and *Nuttall v. Branwell*, 2. L. R. Ex. 1.

Ross, for defendants relied on *Arkwright v. Gell*, 5 M. & W. 232.

Ford, J. held that *Arkwright v. Gell*, applied, and that the works were artificial when the easement was acquired. The Court, however, adjourned the case, for the production of records to shew who built the artificial course.

December 19. *Ford, J.* considered that as the watercourse was artificial, the plaintiffs must be non-suited, as they had no right to have the artificial watercourse kept up for them.

Non-suited.

LIM PEK TEE v. LIM TEET & ORS.

The term "servant" in clause 2, section 1 of the Limitation Act 14 of 1859, applies to domestic or menial servants only—and is not applicable to a claim for wages by the supercargo or nacodah of a ship.

The limitation of 3 years, under clause 9 of section 1, is the limitation applicable to such a claim.

This was an action to recover [*inter alia*] wages which the plaintiff alleged to be due to him as supercargo or nacodah of the defendant's barque "*Eleanor*." The defendants among the defences pleaded that the plaintiff's cause of action did not accrue within one year next before action. By section 1, clause 2 of Act 14 of 1859, it is enacted that, for "suits to recover "the wages of servants, artizans, or labourers, the period of one "year from the time the cause of action arose"

Van Someren, for plaintiff, contended that the claim was not for wages as servant. That the word "servant" in clause 2, section 1, of the Limitation Act 14 of 1859, applied only to menial or domestic servants, and was *ejusdem generis*, with "artizans and "laborers," and cited *Thompson on Limitation*, pages 85, 86 and 87, and the cases there cited.

E. W. *Presgrave*, for defendants, contended that "servant" referred to in clause 2 of section 1, meant servant of any kind, wherever the relation of master and servant existed, and not servants *ejusdem generis* with "artizans and laborers." He further contended, that if clause 2 did not apply, then clause 9 of section 2 gave the plaintiff 3 years only in which to sue, and a great portion of the claim would still be barred.

Wood, J. I am of opinion that the term "servant" means domestic servant, or at least does not mean a clerk or nacodah or

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manager. I consider that the principle of *noscitur a sociis* applies and reduces the generality of the expression "servant" to a more specific kind of service. I think 3 years, under clause 9 of section 2, is the term of Limitation, applicable to the case, as it is simply a dispute as to a contract of service. I shall, therefore, give leave to the defendants to amend their plea of the Statute, by inserting three years, instead of one.

Order accordingly.

The amendment having been made, and the case proceeded with, judgment was given for the defendants on the merits.

ALLEE [IN NAME OF *Sir Thomas Sidgreaves, C. J.*]

v.

SAMAN & ANOR.

PENANG.
—
WOOD, J.
1879.
—
October 27.

An administration bond to a former Judge of the division of the Supreme Court, cannot be enforced in the name of the Judge presiding in that Settlement. Such latter Judge is not a "successor" of the Judge of the division. The proper remedy in such a case is to have the bond assigned by such former Judge, or his legal personal representatives.

Demurrers should be brought forward by way of motion for judgment, under the Civil Procedure Ordinance 1873.

Semble. The Court of Probate Act [1857] 20 & 21 Vict. c. 77 does not apply to the Straits.

This was an action on an administration bond against the defendants as sureties therein. The bond was given in the estate of Allang Tajah, deceased, for the due administration of the said estate by the administrator. It was alleged in the statement of claim that the administrator had wasted the estate. The action was brought by Allee, next-of-kin of the deceased, but the bond being in the name of the late Sir William Hackett, Judge of Penang, the plaintiff commenced the action as above headed,—Sir T. Sidgreaves there mentioned, being the Chief Justice for the time being, and Sir William Hackett having left the Colony and died.

The defendant put in a demurrer to the statement of claim which was now argued.

Van Someren, for defendant, moved for judgment on the demurrer.

Duke took a preliminary objection that the practice adopted in this case in moving for judgment on the demurrer, was erroneous, except at the weekly sittings,—he relied on section 313 of the Civil Procedure Ordinance 1878.

[*Wood, J.* That provision does not interfere with the specific practice in cases of demurrer pointed out by section 119 and the following sections.]

Van Someren, in support of demurrer. There are two points to be discussed. 1st, no relief can be given on the plaintiff's state-

ment of claim. 2nd, plaintiff has no authority to sue in the name of the Chief Justice. The Probate Act in England [1857] gives authority by section 83 for the Ordinary to assign the bond. Section 10 of Ordinance III. of 1873, gives the Court here the authority and jurisdiction as the High Court of Justice at home. Section 14 of the same, gives power to grant Probate and Administration, but the proceedings here are informal. 1 *Williams on Executors*, p. 354 [ed. 1873]. *Henley v. Knight*, 14 Q. B., p. 240, s. c. 19 L. J. Q. B., p. 3. There is no authority which enables an action to be commenced by the mere *locum tenens* of the Ordinary, Sir Thomas Sidgreaves. There is no such person as a Judge of this "division" of the Supreme Court. The divisions are done away with, and there is no section of any new Act dealing with the Judges of the Supreme Court, now being existing law, which gives to the Judges or Chief Justice of the Supreme Court, the status of a Judge of the Division-Court under the Act V. of 1873. If plaintiff wishes to sue he can sue by assignment from the personal representatives of Sir William Hackett, in whose name the bond is made. It is also not stated in the statement of claim that any leave has been obtained from His Honor Sir Thomas Sidgreaves to sue in his name, even if he had power to grant any such assignment.

Duke, contra. The bond although made to Sir William Hackett, is for payment of the money to Sir William Hackett "or his successor," the divisional Judge. Sir Thomas Sidgreaves is a successor to Sir William Hackett.

Wood, J. The plaintiff cannot sue in the name of Sir Thomas Sidgreaves, C. J., but should sue in the name of the personal representative of Sir William Hackett, after assignment properly made. I regret that the law does not enable me to apply even the Probate Act of England, 1857, and in the absence of any Act applicable to this Colony, which enables me otherwise to deal with the matter, the law of England, as shewn to exist up to the date of that Act, and which required the bond to be put in suit by the personal representatives of the obliger of the bond, must prevail. The demurrer will be allowed, but there will be no order for costs. There will also be a stay of proceedings for 6 months in order to enable the nominal plaintiff to obtain a proper assignment from the representatives of Sir William Hackett.

Demurrer allowed with costs. [a]

[a] See *In the goods of Lebby Long*, Ecclesiastical Cases, Vol. II. of these Reports. p. 17.

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v.

SAMAN
& ANOR.

TAN TYE & ANOR.

v.

UNION INSURANCE SOCIETY OF CANTON.

SINGAPORE.

—
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 1879.

A person effecting a Marine Insurance on goods, may insure for an amount over and above the actual value of the goods, to cover charges and a reasonable valuation for profits; but an excessive valuation for profits, is a material fact to the risk of the policy and should be disclosed to the insurers.

The non-disclosure of an excessive valuation, is a ground for avoiding the policy altogether.

November 12,

Ionides v. Pender, 9 L. R. Q. B., 531—discussed.

Action to recover \$9,000, on two Policies of Insurance on certain cargo shipped by plaintiffs on board the *Magnolia*. The facts and points raised, sufficiently appear in the judgment.

Davidson, for plaintiffs.

Donaldson [Dunlop, with him] for defendants.

Cur. Adv. Vult.

On this day judgment was delivered by

Sidgreaves, C. J. This was an action on two Marine Policies of Insurance to recover sums of \$6,500 and \$2,500 respectively on Insurances effected by the plaintiffs with the defendants by their agents, A. L. Johnston & Co., upon certain timber shipped by the plaintiffs in the *Magnolia* for a voyage from Singapore to Shanghai, which timber was wholly lost during such voyage by the perils insured against.

The defendants pleaded several pleas, but rested their case at the trial upon the last three pleas, the last two, however, raising the defences that were principally relied upon—they were as follows:—

“That at the time of the defendants subscribing the said policies respectively and becoming such insurers as alleged, the plaintiffs wrongfully concealed from the defendants a fact then known to the plaintiffs and unknown to the defendants, and material to be known to the defendants, and material to the risk of the said policy, that is to say, that the amount to be insured upon the said goods respectively, and the valuation of the same in the said policies respectively was greatly in excess of the real value of the said goods respectively. Secondly, that at the time of the defendants subscribing the said policies respectively and becoming such insurers as alleged, the plaintiffs wrongfully concealed from the defendants a fact then known to the plaintiffs and unknown to the defendants, and material to be known to the defendants, and material to the risk of the said policy, that is to say, that the plaintiffs were the shippers of a large quantity of other goods, to wit, timber by the said vessel *Magnolia*, parts of which said goods were insured by or on behalf of the plaintiffs under other policies with other persons or companies for large amounts, and that such amounts and the valuations of the said goods in such policies were, and are greatly in excess of the real values of the goods intended to be covered by the said policies respectively.”

The insurances effected altogether by the plaintiffs for the timber upon this voyage with different companies amounted to \$38,000, and it will be seen that the pleas assert that this was an excessive over-valuation of the timber both as regards the amount covered by the two Insurances effected with the defendants, and the whole

amount covered by all the insurances, that the fact of there being such over-insurance was a matter material to be known by the insurers at the time of effecting such insurance, and that it was wrongfully concealed from them.

The case of *Ionides v. Pender*, 9 L. R. Q. B., 531, was relied upon by the defendants as establishing the proposition that if the facts set out in the pleas could be proved, the Insurances would be void. It was not attempted to be shown that there was any actual fraud attempted by the plaintiffs, as was imputed to the insured in the case referred to, where the evidence went to show that the vessel was purposely scuttled—on the contrary, the *Magnolia* was a general ship in which the plaintiffs had no interest beyond their portion of the cargo, and was commanded by a Captain in whom the defendants' agents placed every confidence. The contention on the part of the defendants was almost exclusively confined to attempting to establish the fact that there was an excessive valuation of the timber, and that such excessive valuation was a material fact which the assured were bound to, but did not, disclose. As stated by Blackburn, J. in the case of *Ionides v. Pender*: "It is perfectly well established that the law as to a contract of Insurance differs from that as to other contracts, and that a concealment of a material fact, though made without any fraudulent intention, vitiates the policy. We agree that it would be too much to put on the assured the duty of disclosing everything which might influence the mind of an underwriter. Business could hardly be carried on if this was required. But the rule laid down in *Parsons on Insurance*, vol. 1 p. 495 that all should be disclosed, which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act, seems to us a sound one. We do not think any of the cases cited by Duer are in a contravention of it; and applying it to the present case, there was distinct and uncontradicted evidence that underwriters do in practice act on the principle that it is material to take into consideration whether the over-valuation is so great as to make the risk speculative. It appears to us a rational practice. We think, therefore, that the Judge could not do otherwise than leave this question to the jury, and that their verdict was not against the weight of evidence and should not be disturbed."

Such being one of the grounds, therefore, upon which policies of Insurance may be vitiated, it remains for us to enquire whether in the case now under consideration, there was such an excessive valuation as would constitute a fact material to be known to the Insurers.

There can be no doubt that although a reasonable valuation for profits, over and above the actual value of the timber, would be unobjectionable and need not be disclosed, yet that an excessive valuation for profit, is a fact material to the risk of the policy, and material to be disclosed to the insurers. What that excessive valuation consists in, is a matter to be determined by a consideration of all the circumstances of the case.

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Mr. Henderson, of the firm of Boustead & Co., who act as agents for various Insurance Offices, says that it would depend upon circumstances what amount would be sufficient to make disclosure necessary. In ordinary cases he should say from 20 to 25 per cent. was ample margin for profit, but he states that of shipments from here northwards, he has no knowledge, that in cases of shipments of timber to China, he should certainly consider it necessary to be informed if the estimated profit were over 25 per cent. but that he knows nothing of the profits in the timber trade to China, and is only giving his own idea, not the practice of the office. Mr. Fraser, whose firm is interested in the insurance in question to the extent of \$15,000, considers it material for underwriters to know the amount of over valuation when it is to a great extent, and considers 15 % homewards and 25 % outwards the limit at which he should expect to be informed. Neither he nor Mr. Henderson, however, nor indeed any witness called, professes to be speaking from any experience they have had, nor of any practice that can be said to prevail in Singapore. Mr. Gilfillan is more liberal and would not consider that a profit of 25 per cent. would call for explanation, though 50 per cent. would, and in cases between those two amounts he would pass from the grade of indifference to that of certainty, but he qualifies even this statement as to 50 % by saying that the timber trade used to involve a great deal of risk and delay in settlement, it was a long transaction at both ends, and large profits were sometimes made.

Mr. Barclay Read, a partner in the firm of A. L. Johnston & Co., agents for the defendant, after saying that he should consider 15 % profit to Europe would be an outside cover, says that there is no custom as regards produce to China, he has never been told yet, he has never asked, it is always supposed that the insured is putting on a reasonable profit. Assuming that the concealment from the insurers of an excessive valuation of the timber and the expected profit to be derived therefrom would vitiate the policies, we now proceed to enquire whether or not in the present case there was such an excessive valuation.

The total amount, as before stated, of the insurances effected upon the timber shipped by the plaintiffs in the *Magnolia*, was \$38,000, of this \$14,000 was upon policies effected with Messrs. Hooglandt & Co., and \$15,000 upon policies effected with Messrs. MacLaine, Fraser & Co.

This, representing the insured value of the timber shipped on board the *Magnolia* by the plaintiffs, it becomes necessary to ascertain the actual value of the timber so shipped in order to determine whether or no the over-valuation, if any, of the timber and of the profits to be derived from the sale of it at Shanghai was excessive.

The timber shipped by the plaintiffs was composed of Ballow and Darroo beams, pieces of Kranjie wood and planks. Three documents were put in to prove the quantities of timber so shipped, a copy of the ship's manifest, a memorandum enclosed in a letter from the plaintiff's lawyer, Mr. Koek, to the Captain of the ship, declaring the measurements of the timber for freight

and the invoice. As regards the pieces of Kranjie wood, these documents all agree that there were 50 pieces, as regards the planks, according to the manifest the number was 1,899, according to the memorandum and the invoice the number was 1,995, but no particular question was raised as to that, although the value of those pieces was a matter of considerable discussion.

It was admitted by Mr. Davidson that there was an over-valuation on the Kranjie wood of 48½ per cent. and on the planks of 43 %. With regard to the Ballo and Darroo beams the quantities alleged to have been on board varied very considerably in the three documents, according to the ship's manifest, the quantity was 579 tons, 47 cubic feet, according to the memorandum the amount was 483 tons, according to the invoice the quantity was 818 tons. It will be seen at once that there is a remarkable discrepancy between the memorandum and the invoice as to the number of tons on board, between the measurements insisted upon by the plaintiff as being the correct measurements for freight, and the measurement put forward in the invoice as being the correct measurements for sale. The invoice is dated the 20th May, and the memorandum was forwarded in a letter dated the 21st May, to the following effect:—

SIDGEMAN,
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"Dear Sir,

As instructed by Messrs. Tan Tye & Co., I do hereby give you notice that in terms of the arrangement entered into between you and them, they will pay you freight on the beams and planks shipped in the *Magnolia*, on the measurement specified in the memorandum herewith appended, and they request you to make an entry of the measurement on the Bills of Lading—should you not comply with their request, they will hold you responsible for all losses and damage which they may sustain by reason of your refusal.

Yours faithfully,

(Sd.) EDWIN KOEK,

Advocate of the Supreme Court, S. S.

This letter appears to have been written in consequence of disputes having arisen between Tan Tye and the Captain of the *Magnolia* as to the quantity of timber actually on board, the Captain saying that there was more timber in the ship than Tan Tye wanted to pay freight for, and Tan Tye saying that there was not. With regard to the "arrangement" referred to in the letter, Captain Cater in his evidence taken *de bene esse* says:—

"We measured with a string round, which we divide into four for the sides, and if the log was of unequal size, we measured in three places and took the average. I could not swear whether there was more or less timber on board than shewn by our measurements, but I feel pretty positive that there was not more, if the way of measurement was correct—this was the only way we measured it and it was the way according to agreement."

The invoice showed a valuation upon the timber therein specified of \$30,026.08—to this was added \$2,882.70 for "charges," making the total \$33,068.78—this would make the insurance on

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profit a little over 15 %. But it was strongly urged on the part of the defendants that the invoice could not be accepted as containing the correct quantities in the face of the memorandum forwarded through Mr. Koek to the Captain, and that even assuming the invoice to be correct as to quantity, the valuations were grossly over-estimated. As regards the measurements it will be seen, comparing the memorandum and the invoice, that the number of pieces of Ballow and Darroo is put down in both at exactly the same, *vis.*, 1,733. In the manifest the number of pieces is put down at 1,663, but there was a dispute as stated in the Bill of Lading with respect to 70 other pieces—the addition of these would make up the number also to 1,733. These beams, however, were partly square and partly octagonal—the Ballow timber was composed of 438 square pieces and 443 octagonal—the Darroo of 462 square and 390 octagonal. It is evident that the reduction of a square piece of timber to an octagonal piece, although not decreasing its value, would considerably diminish its bulk and the difference between a piece of timber cut square, and the same piece cut into an 8 sided piece was estimated by Mr. Maclean, the Manager of the Singapore Saw Mills, at 44 per cent.

In measuring for freight the object was to ascertain the actual cubical contents of the timber and for this purpose the mode described by Captain Cater of measuring with a string was adopted. In measuring for sale, however, the octagonal pieces were considered as being square pieces, and we require therefore the addition of 44 per cent. to ascertain the actual cubical contents. It is obvious that, as nearly half the Ballow and Darroo timber was composed of 8 sided pieces, the pieces themselves being of irregular sizes, the difference between the measurements for freight and for sale would be very considerable, and the apparent discrepancy between the measurements in the memorandum and the invoice could be satisfactorily explained, and were satisfactorily explained. As regards the value fixed upon the Ballow and Darroo timber in the invoice, it was quite clear that unless the timber was “dressed” as stated by the plaintiffs, it was greatly over-estimated. According to the defendants, the timber was only roughly dubbed with an axe as it came from the jungle, and in that state put on board. Captain Smith says that he buys timber of that sort of all lengths from 25 to 60 feet in length, up to 12 inches in diameter, and 30 feet in length, that it would be 20 cents a foot.—from 30 to 40 feet in length, a little more, but 25 cents a cubic foot is the most he ever paid.

The price charged in the invoice for the Ballow is 66 cents per cubic foot, and for the Darroo 54 cents per cubic foot, and the contention on the part of the plaintiffs is that this timber was dressed, *i. e.*, prepared for use by being cut true square and 8 sided by carpenters previous to shipment. That the prices charged, if the timber were dressed, were not unreasonable, appears from the evidence of various witnesses, especially from that of Mr. Lyon, who says that he has been doing a good deal of building during the last four years, and has bought and sold a good deal of timber. He fixed the price of dressed Ballow timber last year at from 60

to 65 cents per cubic foot, and dressed Darroo at from 56 to 60 cents per cubic foot. The mean price, therefore, for the Ballow would be $62\frac{1}{2}$ cents or $3\frac{1}{2}$ cents less than that charged by the plaintiffs, and the mean price for the Darroo 58 cents or 4 cents more than that charged by the plaintiffs. There were 418 tons of Ballow, and as $3\frac{1}{2}$ cents per cubic foot would equal \$4 @ 75 per ton, the total amount for the 418 tons, *viz.*, \$731.50 would represent the amount charged by the plaintiffs in excess of Mr. Lyon's charge. But on the Darroo the plaintiffs charge was 4 cents per cubic foot less than Mr. Lyon's, and as there were 400 tons of Darroo, the difference would be \$800 in favor of the plaintiffs, so that in the total charges for both kinds of wood, the plaintiffs' price would be less than Mr. Lyon's by \$68.50. Mr. Davidson, however, does not put his case quite so strongly as that—he gives the cost price of the Ballow and Darroo, adds to it the proportion of charges and then comparing the total with the amounts insured, shows that the Ballow is under—insured to the amount of one per cent, and the Darroo over—insured to the amount of $18\frac{1}{2}$ per cent. or on the two kinds an insurance of $7\frac{1}{2}$ per cent on profit

It was sought on various grounds, to impugn the testimony of Tan Tye and his witnesses that this timber was so dressed, but I see no ground to doubt the substantial accuracy of their statements. Tan Tye himself, Tao Pan and Ung Beng Hong, his clerks, all swore that it was so, and Seh Ing Leang, clerk to Messrs. Harrison & Co., the shippers, who says, he went on board 5 or 6 times in consequence of the dispute between the Captain and Tan Tye's men about the measurements, gave evidence to the same effect. To show that the plaintiffs did deal at times in dressed timber, Mr. Cameron was called, who stated that his firm did a good deal of business in timber, chiefly with Mauritius, and that he had continually been buying timber from the plaintiffs. He produced a bill of the plaintiffs for February, 1879, in which occurs the following item.

“41 Ballow and Darroo beams measuring 1,348 cubic feet; at “55 cents = \$74.40.”

That this was for “dressed” timber we know from Mr. Cameron's evidence, but there is no use of any terms in the bill to indicate that it was so dressed or prepared in any way.

The absence, therefore, of any such term in the invoice cannot be fairly used as an argument against the plaintiffs statement.

Two letters were put in by Mr. Davidson from the consignees of the cargo to the plaintiffs' agents at Shanghai to show the *bond fides* of the whole transaction. Tan Tye admitted that this was the first time that he had shipped dressed timber to Shanghai, and he said that he had it done upon this occasion by the advice of his agent as he would not get a good price for it when not dressed. In the first of the two letters, dated the 8th June, 1878, the plaintiffs' agent writes: “your favor of the 17th of 4th moon [18th May] came to hand on the 4th of 5th moon contents noted I hear you have chartered a vessel from Messrs. Harrison & Co., to load 1,000 tons of *cleaned* timber. As regards the Kranjie and

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the planks, I see no reason to doubt from the evidence that the cost prices were, as charged in the invoice, and the amount of over insurance admitted upon them seems correctly estimated. The insurance effected upon the total amount of the timber shipped by the plaintiffs amounting only to about 15 per cent, it is obvious that the fourth plea cannot be supported.

The third plea raises the specific question whether the admitted over-insurance for profit of 43½ per cent. on the *Kranjie* and 43 per cent. on the planks was such an excessive insurance as would vitiate the two policies now sued upon.

Following the case *Ionides v. Pender*, I should, had there been a Jury, have left that question for their consideration as being a matter for them after taking into consideration all the circumstances of the case. There being no jury, however, I have to decide the matter as well as I can upon my own responsibility. The case of *Ionides v. Pender* has been strongly relied upon by the defendants as showing that such an over-insurance would so vitiate the policies—it is important, therefore, to consider what that case actually decides.

It appeared that the prices of the goods put on board in the case referred to including cost, charges and insurance amounted in the whole to something less than £8,000, whilst the various insurances on the goods including profits amounted to about £14,000, an insurance of commissions of £1,500 and a further insurance of £1,000 on safe arrival, or an insurance of £16,500 on goods worth less than £8,000. Taking into consideration that, as the learned Judge in delivering judgment stated: “the vessel sank at sea under circumstances making it very difficult to understand how she came to sink unless purposely scuttled, this over-insurance must be admitted to have been of a rather startling character. One matter which was particularly noticed was the insurance upon 222 casks of spirits—the cost charges and insurance upon them amounted to £793—and for insurance they were valued at £2,800.” Blackburn, J., in delivering judgment said: “the defendant called underwriters, who gave evidence, without any objection being made, that it was material to underwriters to know the extent of the over-valuation *when it was to such an extent as appeared in this case*. They also stated in effect that, “when the valuation was excessive, the risk was considered a speculative risk, which one class of underwriters would not take at all and another class would take, but only if a sufficient premium was offered; that 25 per cent. was not unusual, and that in one case 30 per cent. had been taken by the first class, but beyond this it would be speculative risk. My brother Hannen, in summing up, pointed out to the jury that the valuation of goods for the purpose of insurance might fairly and properly be made, taking into account not only the original cost of the goods but adding an estimate of the anticipated profits if the goods arrived at their destination; and that opinions might vary as to the profit to be made on a particular venture. He advised them not to find the valuation excessive unless they thought the goods were valued with an addition of profit greater

"than could be expected to be realised under any circumstances which could be reasonably contemplated. This may perhaps be too favorable to the assured, as it makes the question whether there is an excess valuation or not depend on whether the valuation was so high as to amount, in part at least, to a wager, but no objection on that ground can be taken by the plaintiffs. And we think that the evidence here was such as to justify the jury in finding that the valuation of the spirits at least was excessive according to this definition, and this finding cannot be considered as against the weight of evidence."

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What the learned judges in this case decided therefore was, that they would not grant a new trial on the grounds that the judge who tried the case, was wrong in leaving the matters to the jury, that they were not prepared to say that the jury would have been justified in saying that a valuation of £16,500 upon less than £8,000 or more than 100 per cent. was excessive, yet they thought that at all events the jury were justified in finding that a valuation of £2,800 upon £973 or close upon 200 per cent. was excessive, and that the finding could not be considered as against the weight of evidence.

The case just referred to, leaves the law upon the subject as it stood before, and it is thus laid down in the last [1877] edition of *Arnold on Marine Insurance*, page 303—immediately after referring to the case of *Ionides v. Pender*, "In fixing the valuation of goods," Lord Ellenborough says, "the assured may add to the first cost the premium and commission, and, if he sees fit, the probable profit; or, as he elsewhere puts it, he may stipulate that in case of loss, the loss shall be estimated according to the value of like goods at the port of delivery." The learned judge thus distinctly admits that the assured may value his goods in the policy, so as greatly to exceed the invoice price, in order to cover the expected profit. And indeed, as Mr. Stevens remarks, "this is the real advantage that valued policies on goods hold out to merchants." Conformably, therefore, with the law as I understand it, and taking into consideration the evidence adduced on behalf of the defendants by the witnesses who were called not to establish a custom nor even a practice, but to state what they think ought to be the practice under circumstances which, in their experience, have never before arisen, I find myself brought to the conclusion that the 3rd plea of the defendants as well as the others has not been made out and the verdict must be entered for the plaintiffs.

KADER MYDIN & ORS. v. HADJEE ABDUL KADER.

The Attorney-General is a necessary party to a suit relating to a charity, although there may be trustees of the charity, capable of enforcing or protecting its rights.

This was a suit to have it declared that certain lands were the subject matter of a charitable devise, under the Will of one Kader Mydin, otherwise called Captain Kling, deceased. The

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WOOD, J. 1880. plaintiff claimed to represent the charity, being the heir of the late Trustee. On the case being called on,
 KADER MY. *Thomas*, for defendant, took a preliminary objection that the
 DIN & ORS. Attorney-General should have been a party to the suit, and the
 v. petition instead of being a petition should have been by way of
 HADJEE AB- information—he contended that the Attorney-General should be
 DUL KADER. made a party as the charity was of a permanent, and not of a temporary nature; and there was also a prayer for the removal of the defendant the *de facto* trustee of the charity, and a decree of this Court would materially affect the funds of the charity. The charity was a charity of a public nature being for Mahomedans generally—for the whole of the community of Mahomedans. He cited *Lewin on Trusts* [Edu: 1861], p. 599; *Tudor on Charities*, p. 161; *Wellbeloved v. Jones*, 1 Simon & Stuart, p. 40; Lord Romilly in *Ware v. Cumberland*, 20 Beav. 503; *Waldo v. Caley*, 15 Ves., cited in *Wellbeloved v. Jones*. The general proposition is, that the Attorney-General must be a party, where the charity is general or permanent, and the trustees are not a regular body.

Van Someren for the Bill. The objection is premature. The suit is in reference to two pieces of land—the one in grant 239 is denied to be Wakoff or charity land—that in grant No. 149 is admitted to be Wakoff land. No. 149 was never used as a burial ground for the public, but only as the site of the testator's tomb. The Attorney-General is not required to be a party. There is a distinction between where the working of a charity is already vested in trustees, who are capable of enforcing its rights, or liable to the Court, and where there is none such. In the former case, the Attorney-General is not of necessity a party, in the latter he is. *Wellbeloved v. Jones*, 1 Simon and Stuart, 40; *Daniell's Ch. Pr.* p. p. 126, 127 [5th Edn.]; *Mossil v. Lawson*, 2 Eq. cases, abridged, p. 447, also reported in 4 Viner's Abridgment, 500. This last case is precisely in point, and is set out at length in *Duke on Charities*, 682. *Chitty v. Barber*, 4 Brown's Ch. C. 38, quoted in *Daniell's Ch. Pr.*, p. 38, is also to the same effect. Here there is a trustee, the plaintiff—*Goods of Kader Mydeen*, Straits Law Reports, p. 281.

WOOD, J. I am of opinion that the objection is not premature and that the Attorney-General is properly required to be a party, this being a suit relating to charity funds. The case of *Mossil v. Lawson* is contrary to the general run of authorities, and being a very old case, cannot be looked on as an authority. I shall order the adjournment of the case, so that the plaintiff may insert the name of the Attorney-General as a party. There will be no order for costs.

YEO LENG TOW & Co. v. RAUTENBERG, SCHMIDT & Co.

In cases of breach of contract by the non-delivery of goods knowledge—on the part of the party committing the breach, is only of importance [in a question of measure of damages] if acted upon and forming part of the contract.

Knowledge must be brought home to such party, under such circumstances, that he must have known that the person he contracts with, reasonably believed that he [the defaulting party] accepted the contract, with the special condition attached to it.

Where therefore the plaintiff entered into a contract with the defendants, for the sale of certain quantities of Cutch leaf, and thereafter, but before any breach, knew that the defendants were purchasing it in order to send on same to Europe for sale, to certain persons there, with whom they had such contract, and the plaintiff subsequently committed a breach of his contract, by which the defendants were unable to fulfil theirs, and had to pay damages to their sub-contractors in consequence,

Held, that the damages so paid by the defendants to their sub-contractors, were too remote, and could not be recovered [on counter-claim] from the plaintiff, as damages for his breach of contract.

This was an action for goods sold and delivered; the facts fully appear in the judgment.

T. Braddell, [*Attorney-General*] for plaintiffs.

Davidson, for defendants.

Cur. Adv. Vult.

On this day judgment was delivered by

Sidgreaves, C. J. In this case the plaintiffs claimed from the defendants \$7,522.65, being the balance due for Cutch supplied by them to the defendants on various occasions, from the 1st October, 1879, to the 14th January, 1880, both inclusive. The value of the entire amount supplied was \$33,359.69, and payments on account had been made amounting to \$25,837.04, leaving the balance as above stated.

As regards the balance, the defendant by their statement of defence and counter-claim, bring into Court the sum of \$884.60, which they say is enough to satisfy the plaintiffs claim. The circumstances under which the Cutch was sold to the defendants are set out in the counter claim as follows:—

"On the 17th day of September last, the plaintiffs offered to sell to the defendants 2,000 boxes of Cutch at the price of \$5.80 per picul, such offer to be binding on the plaintiffs till 5 p. m., on the 22nd day of the said month of September, and on the 22nd day of the said month of September, the defendants informed the plaintiffs that they had sold the said Cutch, and the plaintiffs thereupon sold to the defendants the said 2,000 boxes of Cutch at the price of \$5.80 per picul, and upon the terms that the plaintiffs would deliver the same at the defendants' godowns within five weeks from the said 22nd day of September, but except as to 1,890 boxes, the plaintiffs failed to deliver the said Cutch within the said five weeks, whereby the defendants lost the benefit of the said sale made by them, and became liable in damages for breach of their contract and loss in exchange and freight, and sustained other losses and damages.

On the 26th day of September last, the plaintiffs offered to sell to the defendants another 2,000 cases of Cutch at the price of \$6 per picul, such offer to be binding on the plaintiffs till 5 p. m., on the 30th day of the said month of September, and on the 29th day of the said month of September, the defendants informed the plaintiffs that they had sold the said Cutch, and the plaintiff thereupon sold to the defendants the said 2,000 cases of Cutch at the

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price of \$6 per picul, and upon the terms that the plaintiffs would deliver the same at the plaintiffs' godowns within six weeks from the said 29th day of September, but the plaintiffs failed to deliver the said Cutch within the said six weeks, whereby the defendants lost the benefit of the said sale made by them, and became liable in damages for breach of their contract and loss in exchange and in freight, and sustained other losses and damages.

On the 4th day of October last, the plaintiffs offered to sell to the defendants another 3,000 boxes of Cutch at the price of \$5.90 per picul, such offer to be binding on the plaintiffs till 5 p. m., on the 7th day of the said month of October, and on the said 7th day of October the defendants informed the plaintiffs that they had sold the said Cutch, and the plaintiffs thereupon sold to the defendants the said 3,000 boxes of Cutch at the price of \$5.90 per picul, and upon the terms that the plaintiffs would deliver the same at the defendants' godowns within six weeks from the said 7th day of October 1879, but the plaintiffs failed to deliver the said Cutch within the said six weeks, whereby the defendants lost the benefit of the said sale made by them, and became liable in damages for breach of their contract, and loss in exchange and in freight, and sustained other losses and damages.

The offers to sell made by the plaintiffs to the defendants were made for the purpose of enabling the defendants to sell the said Cutch, and the sales by the plaintiffs to the defendants were made with the full knowledge that the defendants had already sold the said Cutch, and that time was of the essence of the contract of "sale."

With the counter-claim the defendants delivered particulars of damages for which the defendants became liable to their purchasers for breach of their contract, for the sale by them of the Cutch contracted and purchased by them from the plaintiffs, and which damages the defendants seek to recover from the plaintiffs "\$4,500 damages for breach of contract of sale of "100 tons of Cutch made 4/6 October, 1879, to George A. Alden & "Co., of Boston, at 21s. 6d. per cwt., to be shipped at Singapore, "before the end of November, 1879."

In the reply, after admitting that the Cutch was agreed to be sold in the quantities for the prices, and for delivery within the times mentioned in the counter-claim, the plaintiffs say:—

"That about the time of the expiration of the five weeks allowed for the delivery of the first lot of 2,000 boxes of Cutch above mentioned, the plaintiffs informed the defendants that in consequence of disturbances in Burmah, the plaintiffs would not be able to procure the 3 parcels of Cutch agreed to be sold as above set out in time for delivery as agreed on, whereupon the defendants waived the condition as to the time of delivery in contract of sale, and requested the plaintiffs to procure the said Cutch and to deliver the same to them when the Cutch should arrive, and in consequence of and in pursuance of the defendants' said request and agreement, the plaintiffs procured the several quantities of Cutch and delivered the same to the defendants at the times, and in the quantities set out in the particulars of the plaintiffs' claim in which the plaintiffs suffered a heavy loss from the fact of the price of Cutch having gone up much beyond the prices agreed upon, and the defendants accepted the said deliveries in satisfaction of the said contract.

The plaintiffs deny that the defendants informed the plaintiffs that the defendants had sold the several parcels of Cutch to any other person or had informed the plaintiffs of the intended destination of the said Cutch.

The plaintiffs do not admit that the defendants sold the said Cutch or any of it to any other person, or that by reason of the delivery of the said Cutch after the expiration of the times originally agreed, the defendants lost the benefit of any sale of the said Cutch or became liable in damages for any breach of contract or loss in exchange and freight, or had other losses or damages in relation thereto."

The defendants who are merchants in Singapore deal amongst other things in Cutch, an article not in use apparently in the Straits, but purchased here, especially good Rangoon quality, for exportation to Europe and America.

The defendants had purchased Cutch from the plaintiffs on former occasions, on what are called firm-offers, and on the present occasion, the negotiations were conducted through firm-offers. On the 17th September the plaintiffs signed the following firm-offer:—

“Yeo Leng Tow and Co., offer Firm to Rautenberg, Schmidt and Co., till 5 p. m., the 22nd inst., Monday, 2,000 boxes Cutch in gunnies, good dry quality at \$5.80 per picul, say five dollars eighty cents.

Singapore, 17th September, 1879.”

The 2nd was made on the 26th September, the offer being till 5 p. m., on Tuesday, the 30th inst., 2,000 cases at \$6 a picul, delivery 6 weeks.

The 3rd on the 4th October, for 3,000 boxes till Tuesday, 7th October, 5 p. m., delivery within 6 weeks. Mr. Herwig, the partner in the defendants' firm, by whom the transactions were conducted, says, that these firm-offers are well known in the trade, and that it is the regular way of doing business and used extensively in Singapore; that the object is to enable the intending purchaser to make an offer in Europe or America, and if that is accepted the offer is closed with. Other witnesses, merchants in Singapore, were called to explain what they understood by firm-offers, and the matter seems simple enough. A Chinese firm, or indeed a firm of any nationality trading in Singapore, has produce to sell and go to another firm, probably an European firm, and ask if they can dispose of it. The firm applied to, either do not want it at all, or if they think they can make a profit by the sale of it, and have no enquiry on hand for the article, wish for a few days to make enquiries to see if they can “place” it advantageously. The proposing seller agrees to give them this time and by signing the firm-offer binds himself to let them have the produce on the terms therein stated provided they accept the offer within the time therein mentioned. If the enquiring purchaser finds that it will suit him to buy, then a regular contract is entered into. In the present case, it did suit the defendants after telegraphing to America to make enquiries to buy, and accordingly contracts were entered into, the 1st, on the 2nd September [about which however no question arises,] the 2nd on the 29th September, whereby the defendants agreed to buy and the plaintiffs to sell, delivery in purchasers' godown within 6 weeks, 2,000 cases of Cutch at \$6 per picul, and the 3rd agreement was entered into in like manner on the 7th October, 1879, for the purchase and sale of 3,000 boxes Cutch, delivery within 6 weeks. The time for delivering the Cutch under the 2nd contract expired on the 11th November, under the 3rd contract on the 18th November. No delivery of Cutch was made under either of those contracts within the time specified. According to the particulars of demand, the first Cutch delivered under these contracts was, on the 12th December, when 2,000 boxes

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were delivered, the remainder being delivered on the 17th of that month, and on the 2nd, 7th and 14th January. There was therefore, a clear breach of the contract as regards the delivering within the times mentioned in the contract. The plaintiffs' contention was, that Mr. Herwig, representing the defendants, had waived the question of time and had told them that 3 weeks or 5 weeks after the time was nothing, and that relying upon that waiver of time, they bought the Cutch at a considerably higher price than the contract price in order to fulfil the contracts. Mr. Herwig denies this altogether, although he does say that he told plaintiffs that a delay of a few days would not make any difference.

After carefully weighing the evidence on both sides, I am brought to the conclusion that there was no such waiver of time as that spoken to by the plaintiffs.

Mr Herwig in his evidence gave us the substance of the telegrams sent to his agents at Boston, and their replies; it was obvious that he was only buying this Cutch to sell again, and there must have been a time within which such re-sale must have been effected. He tells us that it was inferred from their key by their agents at Boston, from the telegrams sent, that shipment was to be made in the same or the succeeding month—the 2nd contract being made on the 29th September, he was bound to ship by the end of October, and the 3rd contract being made on the 7th October, he was bound to ship by the end of November, possibly both shipments would have been in time if made by the end of November. It is highly improbable under those circumstances, that Mr. Herwig would have waived his right to deliveries which would have enabled him to perform the contracts which his agents had entered into on his behalf.

But putting the case as strongly as the plaintiffs put it themselves, and allowing an extension of time of from 3 to 5 weeks, they yet failed to deliver even within that time over 2,200 boxes of the Cutch under the 3rd contract. The time for the completion of that contract expiring on the 18th November, the deliveries on the 8th, 14th and 16th January were made considerably beyond even the extended period.

The documents put in evidence, the proposed letter of the 4th November, the letter of the 13th November from defendants insisting upon their claim, and the notice of action of the 20th November, all tend to show that the defendants had not waived or abandoned this essential part of their contracts.

It was argued on behalf of the plaintiffs that they would not have paid the high price for the Cutch which they did, but would have elected to abandon the contract altogether if they had not felt sure that the Cutch so obtained was to be received in satisfaction of the contracts. Possibly it might have been a better thing for them so to have elected, but they must have known that they were rendering themselves liable to an action and to damages of an uncertain amount, and they may have hoped to avoid both by delivering the Cutch as quickly as they could, they knew that they were bound to fulfil their contract for the delivery of a certain

quantity of Cutch, and they may have considered that it was their best policy to deliver it, and as a matter of fact, as certain of the sub-vendees received the late delivery in fulfilment of the defendants' contracts with them, the plaintiffs have by such late delivery avoided to that extent the damages which otherwise they might have incurred. There being therefore a breach of the contracts and no proof of a rescission of the contracts or waiver of the breach, the sole question remaining is, upon what principle are the damages to be assessed, in other words how much are the defendants entitled to deduct from the plaintiffs' claim by way of counter-claim? The defendants' claim to be reimbursed for having lost the benefit of the sales, and for having become liable in damages for breach of their contracts, and for the loss in exchange and freight.

It will be seen that if the plaintiffs have to pay the defendants not only for the loss of profits which the defendants themselves might have made, but also for the damages for which they, the defendants, are liable to the persons to whom they re-sold, the plaintiff may have made themselves liable to a very heavy claim and the selling of produce in this way may be accompanied by very serious perils.

On the other hand the defendants, if they are not able to recover their claim from the plaintiffs, may find themselves involved in a very heavy loss without any default of their own. But the fact is that the Law, whilst scrupulous to carry out the terms upon which contracting parties have agreed, will not allow parties to a contract to be taken unawares—they must, at all events, clearly understand what it is they are engaging to do, and if they agree to extraordinary conditions, with their eyes open, the party who commits a breach of them is responsible for the consequences.

In the present case the knowledge on the part of the plaintiffs that the Cutch was bought for sale in Europe or America, and that the firm-offers were made for the purpose of enabling the defendants so to dispose of it, were relied upon as showing that the plaintiffs must have been aware at the time of making the contract that they would be liable on breach to recoup the defendants for the damages claimed by the sub-vendees.

The plaintiffs deny that they ever had that knowledge, and it is quite clear both from Mr. Herwig's evidence and that of the plaintiffs' manager, that plaintiffs on the 4th November before any breach of either the 2nd or 3rd contract, positively refused to sign a letter which contained an admission that they were liable to indemnify the sub-vendees.

I take it for granted, however, that the plaintiffs knew that the Cutch was being bought to be sold again, and it is difficult to resist the conclusion that they were aware that it was to be sold in Europe or America. Have they thereby made themselves liable for the damages claimed by the defendants? I am clearly of opinion that they have not and that they could not do so unless such knowledge was acted upon and formed the basis of the contract.

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1830.

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RAUTEN-
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C. J.
1880.

YEO LENG
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v.

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BERG,
SCHMIDT &
Co.

In the *British Columbia Saw Mill Co. v. Nettleship*, 3 L. R. C. P. p. 499, the defendant failed to deliver a case containing machinery intended for the erection of a saw-mill at Vancouver's Island, and without which the mill could not be erected, and the question was to what damages were the plaintiffs entitled. In delivering judgment, Willes, J. said:

"What then is the rule which ought to govern a case of this sort? I am disposed to take the narrow view, that one of two contracting parties ought not to be allowed to obtain advantage which he has not paid for. The conclusion at which we are invited to arrive would fix upon the ship-owner, beyond the value of the things lost, and the freight, the further liability to account to the intended mill-owners, in the event of a portion of the machinery not arriving at all or arriving too late through accident or his default, for the full profits they might have made by the use of the mill if the trade were successful, and without a rival. If that had been presented to the mind of the ship-owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And though he knew from the shippers the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of the knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it."

"Knowledge on the part of the carrier is only important if it forms part of the contract. It may be that the knowledge is acquired casually from a stranger, the person to whom the goods belong not knowing or caring whether he had such knowledge or not. Knowledge in effect can only be evidence of fraud, or of an understanding by both parties that the contract is based upon the circumstances which are communicated."

In the present case there was no Cutch to be had in the market at the time when the breaches of contract took place, so that the ordinary course of the purchaser going into the market and getting the article, and then charging the seller with the difference between the contract and the market price could not be resorted to.

To use the words of Erle, C. J. in *Barries and others v. Hutchinson*, 34 L. J. N. S. C. P. 171:

"But if however, the article is one for which there is no market, another principle for estimating the damages must be resorted to, and according to the rule laid down in *Hadley v. Bazendale*, the vendor is to pay such damages as at the time of the contract he may fairly and reasonably be considered to have had noticed that he would be liable for in case of breach of such contract."

This case of *Barries and others v. Hutchinson* bears a marked resemblance to the one now under consideration. In that case the head note is as follows:

"Plaintiffs bought caustic soda of the defendant, part to be shipped in June, part in July and the rest in August. The defendant knew at the time of the sale that the plaintiffs bought to sell again on the continent, and that it was to be shipped from Hull, but not that it was for Russia, although he learned this also before the end of August. The defendant neglected to deliver any such soda during the time contracted for, but he delivered a por-

tion in September and October. There was no market for caustic soda, and the plaintiffs who had contracted for the re-sale of the soda to H, a Merchant in Russia, lost the profit on such re-sale in respect of the soda which was not delivered at all, and by reason of the approach of winter in the Baltic were obliged to pay an increased rate of freight and insurance on the shipment of the soda which was delivered in September and October.

Held, that the damages which the plaintiffs were entitled to recover for the defendant's breach of contract were the loss of profit on the sale to H, and also the cost of such increased rate of freight and insurance, but not the damages the plaintiffs paid H. in respect of a sub-sale made by him to a consumer of the article "

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"
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Co.

As to the damages claimed in respect of the sub-sales, Erle, C. J. says:—

"The plaintiffs have also claimed damages by reason of the sub-sale from Heitmann to Heinburger. If the goods had been delivered to Heitmann and he had delivered them to Heinburger, there would have been a profit to Heitmann of £159 which he has claimed from the plaintiffs, and this the plaintiffs now claim from the defendant. I think this too remote. The defendant had no notice of this at the time of his contract, and without such notice his liability is not to go on for any number of sub-sales. The defendant is therefore not answerable for this loss as it is not the direct consequence of his breach of contract."

Applying those principles to the present case, I consider that the defendants are not entitled to charge the plaintiffs with their own liability in damages to their sub-vendees. It was arranged at the trial that the parties, or their Advocates should assess the damages, if I would lay down the principles by which they were to be guided.

The defendants are entitled to set off against the plaintiffs' claim, the actual loss of profits which they have sustained by reason of the plaintiffs' breach of contract, that is, the net profits which they would have made if the cutch had been delivered in time.

In estimating this, the profits made on the sale of the rejected 75 tons of cutch will have to be taken into consideration in favour of the plaintiffs. The defendants are also entitled to charge the plaintiffs with the loss on exchange and on freight, but not for the cost of the telegrams—subject to what deductions may be made upon these grounds, the plaintiffs are entitled to a verdict for the balance.

In re ARBITRATION OF OPIUM FARMERS.

The Opium Farmer by his contract with the Crown, under the Excise Ordinance 4 of 1870, covenants not to sell opium in the Settlement during the last three months of his exclusive privileges, at an under-rate. Several of the partners in the Penang Farm had shares in certain other farms in foreign adjoining territory—one at Perak and another at Kedah. The former farm was carried on under the same name as the Penang Farm—the latter was not, but that farm and the Penang Farm had a common head-manager. The Perak Farm during the last few days of the exclusive privileges of the Penang Farm, sold opium in Perak territory, immediately next to Province Wellesley, to natives of Province Wellesley, below the usual rates, and so spoilt the Penang incoming Farmer's market in the Province. The common manager of the Penang and Kedah Farms had also exported several chests of opium from Penang to Kedah, there prepared the opium, and re-imported the same into

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Penang, and here sold them in the name of the Kedah Farm, at an under-rate, [at the same time as the Perak Farm was flooding the Province by their acts.] and so also flooded the Penang incoming Farmer's market in Penang. The incoming farmer having charged the outgoing farmer, before His Excellency the Governor, with breach of his contract generally, arbitrators were appointed in terms of the Ordinance, to enquire into the same and make their award. The majority of the arbitrators found these matters proved, and awarded a large sum to the new farmer accordingly. On the award being brought up by the old farmer into this Court, the same was set aside as being in excess of the arbitrators' jurisdiction.

Held, on appeal [modifying the judgment of the Court below,] that the award was rightly set aside as regarded the Perak Farm, as those acts, though injurious, and probably intentionally done, did not take place in this Settlement, but as regarded the Kedah Farm, the arbitrators might well have found, as in fact they did, that the acts were those of the Penang Farm, under the disguise of the Kedah Farm, and upheld their award in that respect.

Ross, had obtained a rule calling on the present Opium Farmer to shew cause why a certain award made by the majority of the arbitrators appointed under the Excise Ordinance 4 of 1870 should not be set aside on the ground that they had exceeded their jurisdiction, and their award, both verbal and in writing, was bad in law. It appeared that the arbitrators had awarded a large sum of money for what they deemed were two breaches by the late farmer, of the Ordinance and his own contract. *1stly*, in that he was also the farmer at Parit Buntar, on the Perak territory, adjoining the border of Province Wellesley, and had there, during the last few days of his privileges in this Settlement, sold opium at an under value, to coolies and other people, residents of Province Wellesley, at a very low rate, and in that way, flooded the Province with opium, and spoilt the new [the incoming] Farmer's market. *2ndly*, in exporting certain chests of opium from here to Qualla Muda in Kedah, to a farm there, preparing it, and importing the same into this Settlement in the name of the Kedah Farm, and as such, through their common manager, selling the same, under the ordinary Penang rate, and spoilt the incoming Farmer's market. The arbitrators appointed, were three in number; but the remaining one, dissented from the award of his colleagues, both on the ground that the evidence did not support the charge that these were the acts of the outgoing farmer; and even if proved, that it was beyond their jurisdiction to make any award in respect thereof. Some of the partners of the out-going farm held a few shares in the Kedah Farm. It was the same as regarded the farm at Parit Buntar: the Parit Buntar Farm was carried on under the same name as the Penang one; the Kedah Farm under a different name.

Van Someren [Thomas with him] for the new farmer, shewed cause.

Ford, J. considered that in both cases the majority of arbitrators had exceeded their powers,—and set aside the whole of their proceedings, making the rule absolute.

1st April, 1883. The new farmer appealed against this decision. The appeal now came on to be heard before *Sidgreaves*, C. J., *Ford* and *Wood*, J. J.

Van Someren, for appellant.

Ross, for respondent.

Cur. Adv. Vult.

April 6. The judgment of the Court was now delivered by **SIDGEMAN, C. J.**
Wood, J. In this case we are unanimously of opinion that the judgment of the Court below should be modified by disallowing the award so far as it relates to the sale of chandoo at Parit Buntar, in Perak territory, but that it should be confirmed so far as relates to the sale of chandoo in Penang, imported from Qualla Muda. **FORD, J. J. WOOD, 1881.**

With respect to the former, the sale of chandoo at Parit Buntar, we are of opinion, that such sale by the old farmers, injurious as it might be, and perhaps intentionally was, to the new farmers, was yet a legal act on the part of the old farmers in their capacity of farmers of Perak, and not the subject of investigation and award by the arbitrators, which investigation was obviously confined to matters of covenant within the Settlement of Penang.

The sale of chandoo in Penang stands upon other ground. The facts as established by the affidavits, we take to be as follows:

What is referred to the arbitrators is a difference arising as to chandoo sold by the old farmers during the last three months of their farm, and it was charged against them that they sold at Penang a certain quantity of chandoo at low rates, which chandoo had been manufactured at Qualla Muda, and sold in Penang by Oh Tek Leang the Manager, both of the Penang and the Qualla Muda Farms. As to this, the arbitrators award that the charge with respect to the Qualla Muda Farm had been proved to the extent of a certain number of taels imported from Qualla Muda by Oh Tek Leang, and sold by him in Penang.

This was substantially the finding of the arbitrators, and we have to decide, not in the least, as to whether they judged justly of the facts or even the law of the case generally, but whether as a matter of dry law the consideration of this matter, was within their jurisdiction.

As undisputed matter of fact, the farms of Qualla Muda and Penang were composed of different co-partners, and we think that it would be erroneous to aver that they were the same farm or branch farms, one of the other. With the reasons of the arbitrators, however, or their errors in judgment, we have nothing to do, but we do see that, arriving at the conclusion by a reasoning of their own, they find that the sale of the opium by Oh Tek Leang, was a sale by the Penang Farmers through the disguise of the Qualla Muda Farm,—a conclusion we may add which, so far as we are enabled to judge of the facts of the case, we have the satisfaction of thinking, was reasonable and just.

The other objections to the judgment of the Court below we have already adverted to in argument.

Mr. Justice Ford, while concurring with the above judgment, wishes to add that in his opinion the Qualla Muda agent in Penang may well be considered to have been the agent also of the old Penang Farm in the sale of the chandoo imported from Qualla Muda.

We accordingly think that the money amount awarded by the arbitrators should be reduced by \$2,730, which is \$2,800 less 2½ per cent., that ratio being in round numbers, the amount of depre-

In re ARBITRATION, OPIUM FARMERS.

SIDGREAVES, ciation to which the \$8,218 has been subjected by the arbitrators,
C. J. when they found for \$8,000, in respect of the two breaches jointly.
FORD } J. J. The award therefore will stand for \$5,270. As we think that
WOOD } 1881. each party should pay their own costs, there will accordingly be
no costs of this appeal.

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Order accordingly.

GOTTLIEB v. HERVEY.

PENANG. Where the Court has once given leave to plaintiff to commence his suit in a
Settlement, under section 65 of the Civil Procedure Ordinance 1878, it will not, as a
rule, vary the order—especially where proceedings have been commenced thereunder.

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1881.

May 9.

Van Someren moved on behalf of defendant, for an order—under section 65 of Ordinance V. of 1878, removing this suit to Singapore or Malacca for trial. [a] He referred to several affidavits, and contended that the evidence in the case was such, as required a removal of it from this Settlement.

Kershaw, for plaintiff, submitted that no order could be made, as he had already obtained leave to bring the action here and had commenced proceedings thereunder.

Van Someren submitted that was on an *ex-parte* application.

Wood, J. The application is dismissed, the costs thereof to be costs in the cause.

HAJEE ABDULLAH & ORS. v. KHOO TEAN TEK & ANOR.

PENANG. Lands of a charity—the Mahomedan church—were vested in the Crown; the
defendants wrongfully entered a portion thereof and commenced building there;
WOOD, J. the Emam, Khatib and elders of the congregation of the church—who were in pos-
1881. session of the church and lands, sued the defendant and obtained an injunction
restraining them from continuing the building.

June 15.

Held, on demurrer, that the plaintiffs could not maintain the suit.

The Court on allowing the demurrer, continued the injunction on certain terms which were complied with by the plaintiffs. The defendants did not then object to this; but three months after, moved to have the injunction dissolved, as the allowance of the demurrer had in law, put an end to the plaintiffs' suit, and the injunction, which went with it.

Held, they were too late, and their application now was practically an appeal against that decision, which could not be allowed.

The Court will, on an *ex-parte* application, give leave to amend all proceedings, by making the Attorney-General plaintiff, and adapting the pleadings to such new state of things.

This was a demurrer to a statement of claim. The suit was brought by the plaintiffs the Emam, Khatib and other leading

[a] The following is the section alluded to: "65. Suits against persons resident in the Colony shall ordinarily be brought in the Settlement where the defendant resides; or, if there be two or more defendants, at the Settlement, where one of them resides; but if it be made to appear to the Court, on the application of either party to be more convenient, in any case, to allow a suit to be brought, removed to or continued at any Settlement, or if all parties to the suit agree, the Court may allow the suit to be brought, removed to or continued at such Settlement."

members of the congregation, meeting at the Mahomedan Mosque at Chulia Street, Penang, commonly called the Kling Mosque: and the object of the suit was to have a declaration that certain lands adjoining the mosque, and on which the defendants had wrongfully entered and inclosed, were part of the mosque land—and for an injunction restraining the defendants from continuing the erection of a building they were then in the course of putting up on the portion of the land so encroached on. The statement of claim, after shewing that the lands had been granted by the Crown, “to the Mahomedan Church,” and that no trustee had been legally appointed, and this Court had in a previous suit held that, as there were no nominees in the grant, the fee simple in the land was vested in the Crown, with whom it lay, as *parens patriæ* to appoint trustees—went on to state, that application for that purpose had been made to the Crown, and was then under consideration by the Government, but the defendants having broken and entered the said land, and was hurriedly putting up a building for purposes which were repugnant to the Mahomedan religion, usage and custom, it was desirous of having this building at once discontinued, and prayed for an injunction. Mr. Justice Ford had, on the petition being amended, by shewing by metes and bounds what portion of the land had been encroached on, and praying for a declaration that such portion was mosque land—granted an interim injunction,—on the *ex-parte* application of the plaintiffs—restraining the defendants, their servants, agents, workmen and labourers from continuing to erect such building. This injunction was duly issued, served and obeyed. The defendants now demurred to this amended statement of claim, assigning for cause that the plaintiffs had shewn no ground in equity, to maintain the suit.

E. W. *Presgrave*, for the demurrer. The bill shews that a decree had been made to the effect that the fee simple was vested in the Crown, and so the plaintiffs have no *locus standi* in this suit, as being merely Khatib and members of the congregation. On moving for the injunction, counsel for the plaintiffs had compared this case to that of *Commoners*, and cited *Hall v. Byron*, 4 L. R. Ch. Div. 667: but there is no analogy between the two cases. Here the plaintiffs have no definite rights which have been invaded.

Van Someren contra, contended that the plaintiffs were interested in the mosque and were parties in possession suing a wrong doer; that the plaintiffs had a right which a Court of Equity would recognize, and cited *Temple v. London and Birmingham Railway Co.*, 9 Simon, 209.

Wood, J. I am of opinion that the plaintiffs have not shewn such a tangible right or tangible grievance, as a Court of Equity can support, on the facts mentioned in the statement of claim. On these facts the defendants appear to have committed a tangible wrong to the church lands in which the plaintiffs, as representing the Mahomedan church, have a direct subject of complaint, inasmuch as the defendants are alleged to have intruded on the church lands, but I am of opinion that they have misconceived their right of action. With the help of the Attorney-General, the

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TEK & ANOR. plaintiffs probably could, by a different form of claim, obtain substantial redress, but at present they cannot. I shall therefore, while deciding in favor of the defendants on the demurrer, continue the injunction, and give leave to the plaintiffs to amend their statement of claim, if their counsel will give an undertaking at once to communicate with the Crown, and to act promptly in the matter. The demurrer will be allowed with costs.

Demurrer allowed.

The undertaking was immediately given, and the injunction continued. Communication was had with the Crown in the matter, and pending the receipt of the reply, the defendants obtained a *rule nisi* to have the injunction dissolved, and the suit dismissed.

September 12. *Presgrave*, for defendants, in support of the rule urged, that the suit having been virtually put at end to by the demurrer, which went to the root of the plaintiffs' claim, he was entitled to have the injunction dissolved then—the injunction in fact, went with the bill and cited *Hindler v. Legardi*, 9 Beav. 468.

Van Someren shewed cause, and contended, that whatever might have been the defendants' right at the time the demurrer was allowed, it was clear the Court had then expressly preserved the injunction—if that order was erroneous in point of law, the defendants should have appealed against it—they had not done it, and it was now too late to question the decision of the Court—this was in fact an appeal against that decision.

[*Wood, J.* I am of that opinion, and must discharge the rule on that ground.]

Presgrave, then urged that he was entitled to have the injunction dissolved on the ground of lapse of time.

Wood, J. I am of opinion that mere lapse of three months, without its being shewn that there was ground for imputing specific negligence, [as if a day had been fixed and not adhered to.] does not enable the Court to hold that the injunction should be dissolved on the ground of unreasonable time having elapsed for the plaintiffs to obtain leave of the Crown, to sue in the name of the Attorney-General. The rule will be discharged, but the costs will be costs in the cause.

Rule discharged.

The plaintiffs having obtained leave to use the name of the Attorney-General,

Van Someren now moved, *ex-parte*, for an order to amend the pleadings, by inserting the name of the Attorney-General as plaintiff, and adapting the pleadings to such new state of facts.

Presgrave objected that the application could not be made *ex-parte*.

Van Someren cited *Duke of Sutherland v. Tunstall Local Board of Health*, 21 W. R. 244, and *Caldwell v. Pagham Harbour Co.*, 2 L. R. Ch. Div. 221.

Wood, J., on the authorities, allowed the amendment to be made, on payment of the costs occasioned thereby.

Order accordingly.

JAMALUDIN *v.* HAJEE ABDULLAH.

The plaintiff claimed to be Khatib and Emam [priest] of a Mahomedan mosque, of which his ancestors were formerly priests,—on the ground that the office of priesthood was hereditary, according to Mahomedan Law. He sued the defendant, the present priest, and claimed to be restored to his alleged office, and an injunction restraining the defendant from so officiating.

PENANG.

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1881.

June 16.

Held, that the defendant could not be sued, and demurrer allowed.

The words "Mahomedan Law," in section 27, clause 2, of the Mahomedan Marriage Ordinance 5 of 1880, must be read as the "Mahomedan Law of property;" the generality of the expression in clause 2, is restricted by the preamble, and context attend, of the clause.

This was a demurrer to a statement of claim. The statement of claim alleged that, in the year 1802, the Government had granted to "the Mahomedan Church," a piece of land at Chulia Street, on which one Cader Mydeen, with the help and assistance of the members of the Mahomedan community, and by means of contributions collected by them from Mahomedans generally, built a mosque on the said land, for the purposes of public worship, by and for Mahomedans of this Settlement. That the then Mahomedan community elected and appointed the plaintiff's great grandfather the Emam and Khatib [priest] of the said mosque, who performed his duties as such, for a great many years, up to the time of his death; that the office of Emam and Khatib being hereditary according to Mahomedan Law, the plaintiff's grandfather [the son of the first Emam and Khatib] succeeded him as a matter of course; and on his death, his son [the plaintiff's father] succeeded to the office, and so held it for about 40 years; that through some disputes, the plaintiff's father was forcibly ejected and prevented from attending to his office and duties of Emam and Khatib, by a portion of the members of the congregation meeting at such mosque; but was supported in his claim to that office, by others of the congregation. The opposition party had nevertheless succeeded in keeping the plaintiff's father out of his office, until his death, about 2 years or so before this suit; that the defendant was the present Emam and Khatib of the mosque, appointed by the said opposition party, but the plaintiff maintained, that as the son of the properly appointed Khatib, he was entitled, according to Mahomedan Law, and the hereditary successor to his father, to hold that office; that there were no trustees to the mosque, and this Court, had in a former suit, held, that the fee simple in the land was vested in the Crown, with whom, as *parens patrie*, it lay to appoint new trustees. The suit claimed "the restoration to the plaintiff, of his office of Khatib and Emam of the said mosque, and to restrain the defendant "from reading the Katoobah [sermon] in the said mosque, or "performing the services of Khatib or Emam therein." The defendant demurred, on the ground that this Court could not afford the relief sought.

Van Someren, for defendant. The plaintiff shews no case by his statement of claim. He bases his claim to the office of Khatib and Emam on Mahomedan Law, which, he alleges, makes the office hereditary—and inasmuch as his ancestors have held the

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office, he is now, by that Law, entitled to do so. This claim the Court cannot recognize. *1stly*, as Mahomedan Law is not the Law administered by this Court, and Ordinance V. of 1880, section 27, clause 2, [the Mahomedan Marriage Act] expressly enacts that "Mahomedan Law, in the absence of special contract, shall be recognised by the Courts of the Colony, only so far as is expressly enacted by this section." Here no "special contract" is shewn, and there is nothing in this section or Ordinance, referring to the office of Emam or Khatib, as being hereditary, or otherwise—or to the Mahomedan Law on the subject, at all.

[Wood, J. The preamble section 27, clause 1, specially refers to the Mahomedan Law of "property," and the preamble to the Ordinance is, for the improvement of the Law relating to "property" as affected by marriages among Mahomedans.]

The preamble is of a limited character no doubt, but the enacting part is not so limited, and in the construction of the Ordinance, the Court will be guided by the enacting clause. *Maxwell on Statutes*, 39-45, *Wills v. Gipps*, 5 Moore's P. C. Cases, p. 379, 388. But *2ndly* apart from this, the suit is not maintainable in this Court, as affecting a voluntary religious association, relative to the internal management of their religious affairs. *Forbes v. Eden*, 1 L. R. H. L. [Scotch Appeals] 569.

Capel, for the plaintiff, contra.

Sabakat Allee, a friend of the plaintiff, and originally a co-plaintiff, was permitted to address the Court on behalf of the plaintiff. He handed in a deed which purported to give to plaintiff's father, a grant or license to be Khatib of the mosque, "and to his descendants." The signatories to this document, he stated were all dead. He also produced further deeds and papers, and among others, the record of a previous action brought by the plaintiff's father against the leading members of the opposition for his wrongful ejection, in which action judgment had been given for the defendants.

Wood, J. I am of opinion, that the preamble of the section 27 of the Ordinance itself, restricts the words "Mahomedan Law," and that it should be properly read to mean, "the Mahomedan Law of property." The context, in the section, points to the Mahomedan Law of property; in particular where, towards the end of it, it says any Mahomedan person, &c. might direct "his estate and effects," to be administered according to the Mahomedan Law. I am, however, of opinion that the plaintiff's suit is deficient, in that it does not bring before the Court, as defendants, the persons who had dismissed him, the plaintiff, or those who represented them. It is obvious, looking at the original grant of the land, "to the Mahomedan church," that there are no proper representatives of the Mahomedan church, who could sue or be sued; and by the record produced by the plaintiff, it appears his father had brought an action for trespass, against certain individuals personally, those acting as representatives of the Mahomedan church, and a verdict was given against him. The demurrer must be sustained, though not on grounds advanced in argument; but on the grounds I have already adverted to. I

think the defendant's counsel should undertake to give the plaintiff, a list of those persons who now represent the Mahomedan church, to appear for such persons, and not to demur on the ground of their not legally representing the mosque. I shall give the plaintiff leave to amend his summons and statement of claim, by making such persons defendants. There will be no costs of this demurrer.

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Note.—The defendant's counsel gave the undertaking.

Demurrer allowed, without costs.—Leave to amend.

F. H. GOTTLIEB v. D. F. A. HERVEY.

The plaintiff and defendant were Magistrates of Province Wellesley, the plaintiff being relieved by the defendant in that office. A sum of money was due the plaintiff by Government, for salary, transport and other charges, which the plaintiff requested the chief clerk to receive and remit to him at Singapore. These monies passed through the hands of the defendant, who allowed the chief clerk to receive same, but never enquired if he had remitted them, till it was found the clerk had embezzled same.

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June 27.

Held, the defendant was not liable to the plaintiff for the amount.

Seemle. Money had and received is not the proper form of action for such a claim. The plaintiff should have stated the facts, and alleged that a duty was cast on the defendant, to see to the proper remitting of the money; but under the circumstances of the case, no such duty, or neglect of duty on the part of the defendant, was shewn.

This was an action to recover \$930.32 for money had and received by the defendant to the plaintiff's use. The facts of the case sufficiently appear in the judgment.

Kershaw, for plaintiff.

Van Someren, for defendant.

Cur. Adv. Vult.

July 11. *Wood, J.* This was an action brought by the plaintiff for money had and received by the defendant for the use of the plaintiff. The facts relied on by the plaintiff are shortly as follows:—

Mr. Gottlieb, the plaintiff, was the Magistrate at Province Wellesley until the close of January, 1878, when he was relieved by Mr. Hervey, the defendant, and as such Magistrate, Mr. Hervey received, by means of cheques paid by the Treasury to him—certain sums due to Mr. Gottlieb for salaries, for travelling allowances as Magistrate in Province Wellesley and for the expenses of Mr. Gottlieb's transport from Singapore to Penang. These sums being received by Mr. Hervey with a full knowledge of the facts, were allowed by him to be retained by Leicester, the Chief Clerk to the Magistrate, in Province Wellesley, and lost by his default. It was contended on the part of Mr. Gottlieb that these monies became monies had and received by Mr. Hervey for the use of the plaintiff, on his receipt of them from the Government, and that it was his duty to have paid them to Mr. Gottlieb, and that having allowed them to fall into the hands of Leicester, by whose

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default they were lost, Mr. Gottlieb had a good cause of action against him. For the defendant, it was contended, that there was an actual agency as between Leicester and Mr. Gottlieb, or failing that, Mr. Hervey had reason to believe that he was acting in accordance with an intention on Mr. Gottlieb's part, of permitting Leicester to draw the money for him, and charge himself [Leicester] with the remitting of it afterwards.

An objection was raised at the trial that the *form of the claim*, viz.:—a claim for money had and received was inapplicable, but with the extended powers which this Court now has in dealing with matters within its jurisdiction, the form in which a claim is presented to us, has little to do with the matter—and I entertain no doubt, that a statement of claim might have been so drawn, as would have enabled the Court to give redress to a plaintiff, where money has been received by a defendant, which it was his duty to pay to the plaintiff, and which had been lost to him, by the default of the defendant.

This question, however, is not material to the decision of the present case, for I feel myself driven to the conclusion that judgment must be given for the defendant, on the ground that Leicester was authorized by Mr. Gottlieb to receive the sums which are the subject of this action, on his behalf, and to account to him afterwards for them.

This question rests upon evidence which leaves in my mind no material doubt. It is asserted by Mr. Hervey that he heard Mr. Gottlieb in conversation with Leicester, enquire of him if "the bills had been got in" and request him to attend to it, and he further pledges himself to a strong impression that Mr. Gottlieb said, or that Mr. Hervey had seen it in writing by Mr. Gottlieb, that "he was to be quick and draw his half salary." This statement is supported by Leicester, who asserts positively, that referring to bills from Government due to Mr. Gottlieb, Mr. Gottlieb requested him to see that the bills were paid to Mr. Gottlieb, and that he was to send the account to Singapore. This evidence which might be doubtful, having regard to the uncertain language of Mr. Hervey and the character of Leicester, who was subsequently convicted of the embezzlement of Government money, acquires a fair amount of certainty, by the fact that Mr. Gottlieb cannot pledge himself to a distinct contradiction of the words which he is reported to have made use of, in his conversation with Leicester; he says, "I have no recollection of speaking to Mr. Leicester about transport bills. I may have said that he was 'to be sure and attend to the matter', but not with reference to these transport bills."

"I do not recollect saying to Leicester that he was to be quick and draw me my half pay."

In addition to this, the facts of the case, and the conduct and writings of Leicester and Mr. Gottlieb, point strongly to the fact that Mr. Gottlieb was content that Leicester should receive the sums due to him. There was more than the ordinary relation of Magistrate and Magistrate's clerk existing between Mr. Gottlieb and Leicester. Mr. Gottlieb had assisted him with a loan of

money, and certainly entrusted him with the charge of paying certain small bills for him, on his leaving for Singapore, without specifically supplying him with funds, any more than that he relied upon him to find funds from the sums which were due by way of interest from Leicester to Mr. Gottlieb; but it is more specially remarkable that until Leicester had embezzled the money, Mr. Gottlieb makes use of no word which contradicts the supposition that Leicester was authorized to receive the money, while in some letters, expressions are used, which point to the actual relationship of principal and agent as existing between them. Thus in Mr. Gottlieb's letter of February 22nd, 1878, to Leicester, he says :

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"I have received your note and several memos. of account which I will attend to; now however I wish to enquire about \$1 left with you [rent for the house at Butterworth] I hope that I shall soon hear from you that you have paid it, so as to enable me to write and tell the Government If you have not [although I hope you have] paid the \$1, please do so and deduct from my pay."

Again in Mr. Gottlieb's letter of March 23rd, in reply to one of Leicester's—he says :

"To-morrow I will look over the accounts you sent. *I was not aware you had received any money on my account*, for in your last you say that Mr. Jones was up the Hill and had not paid you any money Please let me know how much you have received thus :—
"Pay for January :
"½ Assistant Magistrate for
"½ do. do. do.
"Travelling, &c., &c., and tell me if all monies due to me from Government have been paid, if not how much is due to me I hear my bill for transport going to the Province in 1876 has been paid, please send me this money as early as possible."

Again in a letter from Mr. Gottlieb to Mr. Hervey of 27th April :

"I saw from an official sent in yesterday that Mr. Leicester has received my monies, and that you have *desired him to furnish you with a statement of accounts, please get this done as soon as possible*, and send me my monies. *this Mr. Jones promised me he would himself do, and it would have saved you much trouble, and myself considerable inconvenience, had he done so.*"

Other slighter matters bearing upon this point were urged in argument on behalf of Mr. Hervey, but on these facts alone, I find myself driven to the conclusion, that Mr. Gottlieb did, from the first, assent to the holding by Leicester, of the monies due to him by Government; that the direct relation of principal and agent did, in fact, exist between them, and that he looked to Leicester, and to Leicester alone, for the furnishing of an account with respect to such monies. Though I consider that in this case the facts establish an intention on Mr. Gottlieb's part that Leicester should hold the money for him, yet independently of that absolute and specific fact, I entertain much doubt if, under the circumstances of the case, Mr. Hervey would be answerable for the loss of the money. The action is brought as for money had and

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received by Mr. Hervey for the use of Mr. Gottlieb; a technical, and except to a lawyer, an uncertain way of describing the liability of the defendant. I incline, as I before have intimated, to doubt whether this form of statement of claim is appropriate to the facts of the case, and that the claim would have been more aptly stated, had the plaintiff expressed it in the form of a narration of the facts of the case in accordance with the existing practice of the Court in other cases. It would then have been incumbent upon him to shew that the money came to Mr. Hervey's hands, subject to a duty which Mr. Hervey had failed to perform, and this I very much doubt if the plaintiff could satisfactorily have shewn. It is not the case of a person who holds money, the property of another, on any certain and defined trust, but the case of a person through whose hands money, the property of another, passes; and the trust or duty is a trust or duty by way of inference only. Undoubtedly the money passed through Mr. Hervey's hands, and he knew that it was money, the property of Mr. Gottlieb, and the liability of Mr. Hervey would seem to me to depend on whether by allowing it to be in the hands of Leicester, he had acted with that neglect of trust or duty, which the circumstances of the case required, and it is upon this point, that I entertain considerable doubt. It had long been the practice for the Magistrate's clerk to hold the monies received, at least for distribution, and it could scarcely have been reasonably assumed by Mr. Gottlieb, that Mr. Hervey would have held his, Mr. Gottlieb's money, in his own actual possession. Doubtless, under such circumstances, it would have been an act of forethought and prudence for Mr. Hervey to have communicated the fact of Leicester's receipt of this money to Mr. Gottlieb, and a further act of forethought and prudence to have seen that the money was properly transmitted to Mr. Gottlieb but there, as it seems to me his duty or trust would have ended, and I much doubt, whether under the circumstances disclosed in this case, a breach of that duty or trust would have saddled him with the responsibility of making good the loss of the money in the event of Leicester's defalcation. I say under the circumstances, for I think it manifest that some amount of laxity and imprudence was shewn by the parties concerned, excepting Leicester whose mind was no doubt steadily bent on obtaining and appropriating all the money he could. It seems to me unfortunate that a system should have prevailed, whereby the cash balances in the hands of the Magistrate's clerk should so remain without supervision and without check; and few lawyers would deem it strictly business-like, that payment should be made by the Treasurer of a Colony to Colonial Officers and servants, upon receipts which state what could not be the fact, that the monies have been actually received by those different officers and servants, without providing in some way for its being shewn that they were subsequently distributed to the right persons.

It seems to me unfortunate that Mr. Gottlieb who was aware of a previous defalcation on the part of Leicester, had not communicated this fact at least to Mr. Hervey, and that he had given no written or express directions to Mr. Hervey or the Treasurer, not

to pay the sums due to him, to any but himself. No doubt until the fact of Leicester's defalcation was well known and the man found guilty, no question of agency or breach of duty or trust occurred to Mr. Gottlieb, and my doubt is whether under such circumstances, a Court of Law and Equity combined, would hold Mr. Hervey liable for a breach of duty which might be looked at as a duty of imperfect obligation only.

This view of the case was not specifically the subject of argument before me, nor is it material to this present decision except in so far as it affords additional strength to Mr. Hervey's case. It may be considered hardly necessary that I should add that although I feel myself obliged to decide against the plaintiff in this case, no imputation rests upon him of having intended to mislead the Court in his assertion of fact. Both gentlemen, the plaintiff and the defendant, have spoken to facts within their knowledge with perfect fairness and candour. Mr. Gottlieb was, no doubt, after the lapse of many months, unaware of the exact tenor of the language he had used in conversation and in writing with Leicester, and took that sanguine view of his own rights which most persons similarly circumstanced, may not unreasonably be expected to do; but although I cannot but feel he is wrong in attributing the loss of the money to the default of the defendant, we must all regret the result to himself, in the abuse of the confidence and great kindness he had himself personally shewn to Leicester, and the serious pecuniary loss sustained.

Judgment for defendant with costs. [a]

F. H. GOTTLIEB v. LEICESTER.

A person who comes up from one Settlement of this Colony to another, as a witness on a *subpoena*, is privileged in the latter Settlement from arrest on civil process, until he had had reasonable time to return to the Settlement from which he came.

Query. Is a defendant leaving one Settlement of this Colony for another, liable to arrest under section 422 b. of the Civil Procedure Ordinance of 1878, as amended by Ordinance III. of 1880.

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1881.

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WOOD, J.
1881.

July 4.

Action to recover \$227.24 for balance due on a promissory note and on an I. O. U.

The defendant was a resident of Singapore and had come up to Penang on a *subpoena duces tecum* to give evidence in the case of *Gottlieb v. Hervey*. [b] The plaintiff was a resident of Penang, and finding the defendant here, commenced this action against him, and at the same time had him taken into custody on an order of arrest, on the ground of his intended departure for Singapore.

Van Someren, on behalf of the defendant, had obtained a *Rule Nisi* for setting aside the order of arrest in this case on the grounds

[a] The plaintiff gave notice of appeal which was never prosecuted.

[b] *Supra*.

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LEICESTER.

1st.—That the affidavit was defective in not bringing the case within section 422 b. of Ordinance 5 of 1878, as amended by Ordinance 3 of 1880. [a] It is defective in four respects:—

1. It only shews the defendant was going to Singapore and not leaving the Colony.
2. That it does not shew he was going for the purpose of avoiding service of process.
3. It does not shew that the absence of defendant would materially prejudice plaintiff in the prosecution of his action.
4. It states only the belief, but does not state the grounds of belief.

2nd.—The defendant is privileged from arrest as he came up from Singapore under a subpoena from this Court and was now about returning.

3rd.—The defendant's christian name is given as "Horatio" instead of "Heury."

Gottlieb [plaintiff] in person shewed cause.

1st.—With respect to section 422 b., Settlement is one thing, Colony another, but the defendant is temporarily residing in Penang, and he must therefore be taken to dwell here, and his leaving is a leaving of his dwelling within the meaning of the section. *Alexander v. Jones*, 35 L. J. [N. S.] 78. As regarded the misnomer of defendant, it might be amended under section 9 of Ordinance 5 of 1870, also section 262. The defendant is not privileged from arrest. *Watson on Sheriff*, p. 139.

Wood, J. The defendant is clearly entitled to his privilege from arrest and the order therefore must be set aside.

Rule absolute.

MEYAPPA CHETTY v. KHOO BEAN TEEN & ORS.

PENANG.

Affidavits, filed with bills of sale, under section 18 of Ordinance 22 of 1870, must be construed with strictness.

WOOD, J.
1881.

The omission to describe the occupation of a grantor of the bill of sale, renders it void, under the section aforesaid, against an execution creditor.

July 11.

An affidavit filed along with a bill of sale, executed by two grantors, stated that "the grantors *reside* in Bridge Street, and is a trader,"

Held, the description was defective, as being ambiguous as to which of the grantors was referred to, and not being a description of both.

This was an action to recover \$179.75, damages for wrongfully depriving plaintiff of his goods. The defendants were

[a] Section 422 B. "When the plaintiff in any civil proceeding in the Supreme Court, proves at any time before final judgment.....by evidence on oath to the satisfaction of the Court that the plaintiff has a good cause of action or other valid claim against the defendant, and that there is probable cause for believing.....having regard to the defendant's conduct or to the state of his affairs, or otherwise that he has withdrawn or is about to withdraw himselffrom the Settlement. for the purpose of avoiding the process of the Court or under such other circumstances as to induce the Court to believe that the ends of justice are likely to be defeated unless he be arrested, and that there is also probable cause for believing

execution creditors of Tey Lye and another. The plaintiff was the holder of bills of sale by way of mortgage, on the goods of the said Tey Lye and another. The seizure was admitted; and the only question was, as to the validity of these two bills of sale. The one was dated 5th February, 1880; and the other 11th February, 1881; they were both registered within 21 days of their execution, under section 18 of Ordinance 22 of 1870. In the first, the affidavit accompanying the bill of sale omitted to state the occupation of the grantors, in the second, the affidavit stated that, "the said mortgagors reside at Bridge Street, and is a trader."

Van Someren, for defendants contended, both bills of sale were void—the first, as the affidavit wholly omitted the occupation of the grantors. *Pickard v. Bretz*, 5 H. & N. 9; and the second, as the description was defective, either it referred to the last of the two mortgagors, in which case it would be grammar, but defective in omitting the description of the first mortgagor—or it was a description of the first mortgagor, and omitted that of the second. The description in fact was imperfect, and the registration and bill of sale void. *Tuton v. Sanomer*, 3 H. & N. 280; *Broderick v. Scale*, 6 L. R. C. P. 98; *Pickard v. Marriage*, 1 L. R. Ex. Div. 364; *Murray v. Mackenzie*, 10 L. R. C. P. 625. The rule with reference to description of grantors in the affidavit, was the same as regarded that of the witnesses. *Tuton v. Sanomer*, *supra* [p. 283] *Broderick v. Scale*, *supra* [p. 103] and according to *Pickard v. Marriage*, the description of one witness, where there are more than one to the bill of sale is not enough. Here there were two grantors, and the description of both should have been given, or the bill of sale is void under section 18 of Ordinance 22 of 1870.

E. W. *Presgrave*, for plaintiff, admitted he could not contend against *Pickard v. Bretz* as regarded the first bill of sale; but as regarded the second, he contended the Court would incline against technical objection to such an affidavit. Here in the second affidavit, the description began by describing both grantors—"mortgagors," in the plural—but in continuing it, spoke as if of one person. It was presumably a clerical error, and not such as to vitiate the registration.

Wood, J. In my opinion the defendants are entitled to judgment. The affidavit, in accordance with the decisions, must be construed with strictness: here there is an ambiguity as to whether one or the other of the grantors was referred to. It is not a description of both. The registration and bill of sale are void under section 18 of the Ordinance of 1870 against the defendants, the execution creditors.

Judgment for Defendants.

the absence of the defendant from the Settlement will materially prejudice the plaintiff either in the prosecution of his suit or otherwise, the Court may order such defendant to be arrested and imprisoned for a period not exceeding six months unless and until he sooner gives security not exceeding the amount claimed in the suit and the probable costs of the suit that he will not go out of the Settlement without the leave of the Court."

WOOD, J.
1881.

METAPPA
CHETTY

"
KHOO BEAN
TEEN & ORS.

GOLAM KADER v. SHAGAPAH CHETTY.

PENANG.

Wood, J.
1881.

July 13.

The Court refused to stay execution in a suit, or order the defendant therein to pay into Court a portion of the amount of judgment, on the application of a plaintiff in another suit, and a creditor of the plaintiff in the first, although it was alleged that the plaintiff in the first suit was insolvent.

This was a suit for money had and received and general average contribution, which was still awaiting trial. The defendant had recovered a judgment against one Pah Etam to a large amount, but it was alleged, and was not denied, that he [defendant] was insolvent, and besides the amount recovered by the judgment, had nothing which the plaintiff could levy on, if he got judgment hereunder. The said Pah Etam was the agent in Penang for the plaintiff who was out of the jurisdiction.

E. W. *Presgrave* on summons, now moved on behalf of the plaintiff herein for an order to stay execution in the case of *Shagapah Chetty v. Pah Etam*; or that Pah Etam, the defendant in that suit, be ordered to pay into Court so much of such judgment as would cover the probable amount of judgment and cost herein, until this action would be decided. This the said Pah Etam was willing to do.

Van Someren, for the defendant herein, contended that no order, as asked, could be made—the application was in effect an attempt to get a sequestration, although the case did not fall within section 422 of the Civil Procedure Ordinance 5 of 1878, as amended by 3 of 1880.

Presgrave having obtained leave to look up authorities in the point, the motion stood over.

July 15th. *Presgrave* now renewed his application and asked that the money should be paid into Court.

Wood, J. I consider this application is wholly unsupported by authority, and must refuse it.

Order refused.

SHAGAPAH CHETTY v. CAPEL & ANOR.

PENANG.

Wood, J.
1881.

July 15.

A plaintiff is entitled to his costs against all defendants in the suit, although the defendants may have severed in their defence, and one of them adopts a line of defence which occasions heavy costs, and with which the other is wholly uninterested.

In this case, judgment having been given for plaintiff with costs, on taxation of such costs, Mr. Kyshe, the Deputy-Registrar, had decided that the plaintiff was entitled to his entire costs as against all the defendants, although some portions thereof, [for a Commission to India, for evidence,] was occasioned wholly by the line of defence one of the defendants [Capel,] adopted; and with which the other defendant had had nothing to do. The defendant Capel had since died insolvent. The defendants had severed in their defence all through; and had been represented by different Solicitors and Counsel.

E. W. Presgrave, on behalf of the defendant Pah Etam, now applied, on summons, for a review of the taxation and variation thereof, according to the respective proportions occasioned by the respective defences of the defendants. He contended the Court could now apportion costs under section 463, Ordinance 5 of 1878; and that, ever since the Judicature Acts, was the rule. He cited 2 *Daniel's Oh: Practice* [Ed. 1871] pp. 1267, 1268.

Van Someren, on behalf of plaintiff, submitted this was not a case wherein the Court would interfere with the Registrar's taxation, and referred to *Wilson v. Forde*, cited in *Bull. N. P.* [7 Ed.] p. 335, as being in point.

Wood, J. I consider the plaintiff is entitled to his general costs against all the defendants and the Registrar has acted rightly.

Summons dismissed with costs.

WOOD, J.
1881.

SHAGAPAH
CHETTY
v.
CAPEL &
ANOR.

ABOOBAKARSAH v. AHAMAD JELLALOODIN.

The Court allowed the defendant to amend his Statement of defence, which had been filed and delivered, by adding thereto, a plea of the Statute of Limitations, but reserved leave to the defendant to appeal, considering the point not free from doubt.

Rolt v. Cox, 2, Wilson 253, is not of present authority.

The words "real question in controversy between the parties," at end of section 14 of the Civil Procedure Ordinance 5 of 1873, mean, the right of the plaintiff to a cause of action at the time of the issuing of the writ of summons.

PENANG.

WOOD, J.
1881.

August 15.

Suit for partnership accounts.

Kershaw, on behalf of defendant applied, on summons, for leave, under section 184 of the Civil Procedure Ordinance 5 of 1873, to amend his statement of defence, by adding a plea of the Statute of Limitations. The section reads as follows:—

184. The Court may, at any stage of the proceedings, allow either party to alter his writ of summons, statement of claim or defence, or reply, or may order to be struck out or amended any matter in such statements, respectively, which may be scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the suit, and all such amendments shall be made, as may be necessary for the purpose of determining the real questions or question in controversy between the parties.

Van Someren contrà, relied on *Rolt v. Cox*, 2 Wilson 253, as in point—and that leave would not be given to set up a technical defence. *Collette v. Goode*, 7 L. R. Ch. Div. 842, as it is not the real question in controversy. He also applied for leave to appeal, if the decision was against him.

Wood, J. I consider the case of *Rolt v. Cox* an old case, and not of present authority. I think a liberal practice governs the Court in these days, to allow defence as to pleadings, when the error is by want of knowledge on the part of the party, of the force and effect of the Statute of Limitations, or want of discretion in his advisers. As a single Judge, sitting as a Judge of 1st instance, it is my duty rather to admit, than to circumscribe liberty in the

WOOD, J.
1881.
—
ABOOSAKAR-
SAH
v.
AHAMAD JEL-
LALOODIN.
defendant to amend his plea, by pleading *issuable* matter—and “the real question in controversy between the parties” in section 184, I am of opinion, are reasonably and justly construed as being, the right of the plaintiff to a cause of action at the time of the issuing of the Writ. The defendant ought fairly to be allowed to raise the defence which then existed, whether he had made mistakes of law, or of practice, himself,—or his advisers had done so for him. The amendment is allowed subject to payment of costs occasioned by amendments, and leave is given to plaintiff to appeal against this my decision, which I consider not free from question, should the question be found to turn on the Statute of Limitations. [a]

DANIEL LOGAN v. HEOH AH TAN.

PENANG.
—
WOOD, J.
1881.
—
October 10.
Where two holders of lands under Government permits, arranged among themselves that a certain stream running through the land of one of them should be the boundary of their respective lots, and by this means the one through whose land the stream passed was depriving himself of a certain strip of land included in his permit and giving up the same to the other of them, and the one so depriving himself of the said strip died leaving an Executor who sold his interest in the permit to the plaintiff, who, on production of the permit to the Land Office, obtained a grant in fee from the Crown, of the whole land comprised in such permit, including the strip so given up, and thereafter sought to eject the other permit-holder from the strip so given up to him,

Held, that the fact of the plaintiff being a grantee in fee from the Crown, made no difference, but the plaintiff acquiring the grant on the strength of the permit, purchased as aforesaid, was bound by the arrangement made by his deceased predecessor, and could not recover possession of the said strip.

Where a permit was issued under a Government Notification of 1852, which Notification could not be found, and the permit-holder subsequently obtained from the Crown a grant in fee of the land comprised in the permit,

Held, that it must be presumed that the Notification gave the permit holder a right to the land *in fee* on certain conditions which had been complied with and not an estate for years under Act 16 of 1839.

Action of ejectment to recover possession of a piece of land, lot No. 4431, situate in the district of Buan Lepas, in the division of Kampong Kafri in Penang, containing an area of 52 square acres and 22 perches comprised in grant 10,096, dated 1st October, 1873.

The defendant limited his defence only to that portion of the land claimed, lying to the east of the stream hereinafter mentioned, comprising about 9 orlongs of land being part of the 52 acres, and by his amended plea, *inter alia*, stated, that in or about the year 1859, it was verbally agreed between the defendant and the late James Richardson Logan, that a certain river running through the land of the said J. R. L. should form the boundary between the lands of the said J. R. L. and of the defendant; that relying on the said agreement, the defendant entered upon the land from which the plaintiff sought to eject him, and cleared and cultivated the same, and from the year 1859, had enjoyed quiet and peace-

[a] As the plaintiff failed to prove the partnership—which the defendant denied—the case was decided on the merits, and no appeal was consequently brought.—J. W. N. K.

ful possession thereof; that the plaintiff in the first instance acquired the whole of the land claimed by purchase from the executors of the said J. R. L., and by reason of the premises, was not entitled to deny the efficacy of the said verbal agreement between the said J. R. L., and the defendants; also that plaintiff's cause of action, in respect of these 9 orlongs, did not accrue within twelve years before this suit. Issue thereon.

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1881.

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v.
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TAN.

At the first hearing on the 17th August, 1881, the plaintiff proved, that the whole of the land claimed by him, was granted to him by the Government of the Straits Settlements in fee, by grant above-mentioned; that the lands were originally held on a permit, dated 6th December, 1859, granted by the East India Company to the said J. R. L., the father of the plaintiff, and purporting to issue under Government Notification of 1852, which Notification was not forthcoming; that the plaintiff had purchased the interest of the said J. R. L., in the permit and the aforesaid lands comprised thereunder, from the executor of the said J. R. L., and on presentation of this permit, and payment of certain heavy fees, had obtained from the Crown, the aforesaid grant of the whole of the land in fee as before stated. On the close of the plaintiff's case, the defendant set up a verbal arrangement between him and the said J. R. L., made in 1859, by which the aforesaid stream running through the lands of the said J. R. L., so acquired by the plaintiffs as aforesaid, should be the boundary between the land of the defendant and the said J. R. L. The fact was spoken to by defendant only, as follows, he, "J. R. L., told me that this stream was the boundary between his land and mine, flags were put up to mark the boundary close to the stream. After clearing the forest, I planted nutmeg and fruit trees, nothing further was said about the land, these trees are now full grown." There was no corroborative evidence of any kind in support of the statement. The defendant held 2 permits, Nos. 10 and 11 for land lying immediately to the east of the land claimed by plaintiff, and adjoining that portion of the plaintiff's land lying to the east of the aforesaid stream; this stream cut the plaintiff's land by about two-thirds from north to south. The Government plan, included the aforesaid stream and strip of 9 orlongs, in the plaintiff's grant. At the trial, the Court was of opinion that the verbal agreement set up by the defendant had been proved, but his statement of defence not having set up such an agreement, and the plaintiff having been taken by surprise, the Court gave leave to the defendant to amend his statement of defence by setting out this arrangement, and adjourning the case so as to permit of this amendment being made, and to give the plaintiff an opportunity to adduce evidence in disproof of the arrangement set up. The case was accordingly adjourned, and the statement of defence amended as hereinbefore set out. At the adjourned hearing this day, plaintiff adduced certain evidence which, however, did not expressly disprove the aforesaid statement of the defendant.

Van Someren, for defendant contended, that as both the defendant and J. R. L., were mere occupiers of the lands on per-

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1881.

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v.
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mit, [a], any arrangement then made between them, could not affect the plaintiff who was now grantee in fee of the lands from the Crown, that the plaintiff stood in the place of the Crown, and the Crown would not be affected by such an arrangement between the permit-holders. Sixty years had not expired to deprive the Crown of its right to the lands, or to grant away the same in such manner as it thought fit; that an arrangement between contiguous land owners *inter se* to a rectification of boundaries was not final, even although, acting on the understanding, one of them expended money on the land of the other; that the real rights of the parties would be upheld both by Courts of Law and Equity, the party aggrieved being compensated by the other. Story's Eq. Juris., §§ 1533-4-5-7; *Rennie v. Young*, 2 De Gex & J. 136; *Cairncross v. Lorimer*, 7 Jur. N. S. 149; Hunt on Boundaries, 258-9; *East India Co., v. Vincent*, 2 Atkyns 82; *Dann v. Spurrier*, 7 Ves. 231; that J. R. L., the permit-holder, was mere tenant at will to the Crown and the tenancy determined at his death. *Turner v. Barnes*, 31 L. J. Q. B. [N. S.] 170, and plaintiff therefore acquired no interest from him, and the supposed purchase thereof from his executors was a mere idle thing; plaintiff was therefore not privy in estate to J. R. L., but a grantee in fee, of the Crown, and was not estopped by the arrangement set up, even if proved, and otherwise valid against J. R. L.; that there was no estoppel, as the character of plaintiff as assignee of J. R. L., was changed to that of grantee from the Crown. *Doe d Homby v. Glen*, 1 Ad. & E., 49; *Goodeve on Evid.*, p. 424, 538; that there was a fraud, in point of law, on the part of J. R. L., or his executor, in not disclosing to plaintiff, at the time of his purchase, the arrangement made with defendant, and the plaintiff was therefore not estopped in contesting the defendant's alleged right. *Doe d Williams v. Lloyd*, 5 Bing. N. C. 741; 1 *Taylor on Ev.* § 27.

E. W. Presgrave, for defendant was not called on.

WOOD, J. I am of opinion that it has been proved, as a fact, that notwithstanding the boundaries of the defendant's permits Nos. 10 and 11, and of Lot No. 4431, in plaintiff's grant are shewn to be as in the plan in the Government Office, yet that, sometime about the year 1859, it was agreed between Mr. James Richardson Logan and the defendant, that the stream running through Mr. Logan's lands, should be the defendant's boundary under permits 10 and 11, thereby depriving J. R. Logan of the permission to clear about 9 orlongs of land. I further find, that the defendant acted on the faith of this arrangement, and planted the land as included in his permits. I also find, that the plaintiff afterwards acquired the land of J. R. Logan from his executors by purchase, and the Crown on the strength of this permit, which the plaintiff produced to the Land Office, granted him a conveyance of the whole land comprised therein, in fee—including that portion given

[a] Sir Ralph Rice, Recorder, appears to have held that the holder of lands under a permit, had but an inchoate right, which was not alienable till perfected by a grant. The case, however, cannot be traced, but see "*Papers and Correspondence, Land Revenue Administration, S. S., 1823-37.*" [published by Hon'ble W. E. Maxwell, 1884.] p. 27.—J. W. N. K.

up by J. R. Logan, to the defendant. At the first hearing of the case I was inclined to hold that on this state of facts, the plaintiff was not entitled to deny the efficacy of the agreement so entered into between his predecessor, the said J. R. Logan, and the defendant, concerning the boundary of their respective lands—but was bound by it: the statement of defence, however, not having stated the special fact, I considered it right to give the defendant permission to amend his defence, by stating them, and the plaintiff leave to adduce evidence to disprove the arrangement. This was accordingly done, and the case now comes on before me for final decision. On the facts I see no reason to alter my previous findings; I consider that J. R. Logan and the defendant agreed as to the boundary, as being permittees under the Government, with a view to the permanent arrangement of boundaries—each personally intending to obtain, a fee simple, of the land actually occupied by him, in the regular order of Government holdings. According to the practice in the Land Office of the Settlement, a permit holds good until the permittee is willing to take a grant.

As regards the first objection, I can see no reason why an agreement of sale or purchase of an expectancy, should not be valid, see *Buckley v. Newland*, 2 P. Wms. 182; the arrangement between the permit holders, in expectation of obtaining regular grants, I think, must be considered in the same light. I am further of opinion, that the plaintiff is privy in estate to J. R. Logan, of the interest which he, J. R. Logan, then had by purchasing from his executors, their interest in the land. This land they had a sufficient interest in, to convey: but bound as to its extent and boundaries, by the contract made with defendant. This interest I consider was an interest in land, with a claim upon the Crown to have it enlarged to an estate in fee simple. The plaintiff obtained his grant in fee, in conformity with the usage of the Land Office in this Settlement, in virtue of his interest acquired from his father. This grant, enured to extend the duration of the plaintiff's estate, but not its territorial extent, which was limited by the contract J. R. Logan had made with the defendant, and which has been acted on and acquiesced in by J. R. Logan and his assigns, since that time. The judgment will be for the defendant, in respect of the portion defended for, with costs.

The plaintiff appealed against this decision, and such appeal was heard on the 28th April, 1882, before *Sidgreaves*, C. J., *Ford* and *Wood*, J. J.

Van Someren, for plaintiff, reiterated his arguments in the Court below, and referred to *Story Eq. Jur.* §§ 398, 799, 1236-7, in addition to the authorities then cited. He further contended, that there was no reasonable evidence in support of the finding of the Court below, of the alleged agreement between J. R. L., and the defendant; that the only evidence was the statement of the defendant, and that of the most vague kind, and such agreement was not set up until the trial, and was an afterthought, J. R. L., being dead, and his executor also dead, the

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SIDGREAVES, plaintiff, who personally had no knowledge of the matter, was unable to disprove the alleged agreement and was thus at a disadvantage. The question of whether there was or was not, reasonable evidence, was one of law, and a decision based on evidence which was not reasonably sufficient, would be erroneous in point of law. *Best on Ev.* 104. That the old doctrine, that if there was a scintilla of evidence, it was sufficient to justify a case being left to a Jury, and no objection in point of law could be taken thereto, had long since been exploded, and the question now always was, whether there was reasonably sufficient evidence or not. *Avery v. Bowden*, 26 L. J. Q. B. [N. S.] 3, *Ryder v. Wombwell*, 4 L. R. Ex. 32, 38. That under the Act 16 of 1839, under which the permits were issued, the permit-holder was only entitled to a lease for 20 years, renewable for another 30, at the end of that time,—or this was all J. R. L., could have had, and if plaintiff was privy in estate to him, it could only be to that extent; but here plaintiff under the grant of 1873, came in for a new and larger estate, even an estate in fee, which J. R. L., had no right to, and the plaintiff could not be said therefore, to have acquired that right from him. The agreement relating to an interest in land, was also void under the Statute of Frauds, 29 Car. II, c. 3. The Statute of Limitations did not apply, as 12 years was not sufficient to bar the Crown, nor therefore the plaintiff, the grantee of the Crown.

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May 2. *Sidgreaves*, C. J., said, that as regarded the objection of want of reasonable evidence, there was a great difference between the present case and that of *Ryder v. Wombwell*; that here, there was the uncontradicted statement, on oath, of the defendant, that such an agreement had been made with him by J. R. L.; it might have been, that that evidence could have been amplified by further witnesses, but the fact that it was not, he considered did not render that statement less reasonably sufficient evidence, than it would otherwise have been. It was acted on in the Court below and he was not prepared to say it was not reasonably sufficiently to support the finding of that Court. As regarded the objection that the plaintiff in getting a grant in fee, was not acquiring the interest of J. R. L., under the Act 16 of 1839, it must be remembered, that the permits held by the defendant, as well as by J. R. L., were under a Government Notification of 1852; this Notification had not been produced, and it was said could not be found. What the contents of that Notification were, the Court knew nothing, but seeing the grant in fee to the plaintiff, made presumably in pursuance of the Notification, it was bound to assume that Government acted on this Notification, and in exercise of its inherent right to grant its lands in fee. That the interest of J. R. L. was therefore not an estate for years, such as is referred to in Act 16 of 1839, but an estate in fee under this Notification. The plaintiff therefore, by the grant acquired the

identical interest of J. R. L., and was privy in estate to him, and bound by his contracts in reference to the land. The other objections had been answered in the judgment of the Court below, and he saw no reason for being dissatisfied with those answers. The judgment for defendant in the Court below should in his opinion, be affirmed, with costs.

Ford and Wood J. J., concurred.

Judgment affirmed.

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Defendant having been arrested on an order of arrest, granted on affidavits of two deponents, to which there was only one jurat attached, which was to the effect that it was sworn to by the "deponent" [in the singular].

Held, a fatal defect; and the order was set aside.

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November 21.

Van Someren, for defendant obtained a rule to set aside the writ of arrest granted in this case, and obtained by F. H. *Gottlieb*, of Counsel for the plaintiff:—

1. On the ground that the affidavits were insufficient, and that it may be shewn reasonably from the counter-affidavits of defendant that he had no intention of leaving the Colony.

2. That the writ of arrest in following the form given in Form 53 of Ordinance 3 of 1880, was bad as requiring the defendant to give security for too much. The action was on a contract, and the order or writ,—besides requiring security to be given by the defendant "that he would not leave the jurisdiction," went to state, "or that any amount recovered against him would be paid, or the defendant rendered to prison," section 423 b. The Sheriff was bound to obey the order explicitly, and thus defendant would be greatly prejudiced.

3. The affidavit was deficient in this, that the plaintiff sued as plaintiff—one of a firm—and stated that the defendant was indebted to the firm. Plaintiff ought to have sued in the name of himself and his co-partners, or in the name of the firm.

4. The copy of the affidavit was not a true one, for it had the word "an" account instead of "his" account. Power of amendment under section 9 would not be exercised—as "an" for "his" was material—and the goods alleged to be sold and delivered were not said to be, by the plaintiff to the defendant. *Taylor v. Forbes*, 11 East., 315; *Young v. Gatieu*, 2 M. & S., 603; *Handley v. Franchi* 2 L. R. Ex. 34.

5. The affidavit consisted of affidavits by two persons—there was one jurat at the end of both, and was in the singular—word "deponent," is used. *Pardoe v. Terret*, 12 L. J. C. P., 143; *Cobbett v. Oldfield*, 16, M. & W. 469.

6. "This," was altered into "his," in the jurat—"his" is material—*Mary Ann Worthington*, C. B. 511.

F. H. *Gottlieb*, for the defendant shewed cause.

Wood, J. I consider no satisfactory answer is given to objection 5, for perjury clearly could not be assigned on it, against either of

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the deponents—the objection is fatal. The form of the order of arrest, in requiring security for payment of the amount, or defendant be rendered to prison, is clearly erroneous; but I am inclined to think that the objection is not fatal, as it might be treated as surplusage, the Sheriff being guided by the section in the Ordinance.

Writ of arrest set aside—costs to be costs in the cause.

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v.

TUNKU ALLUM BIN SULTAN ALLIE ISKANDER SHAH.

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When a document relating to affairs of State is declined to be produced,—it is for the Officer of Government, subpoenaed to produce it,—and not for the Court,—to decide, whether its production would be contrary to good policy, as not conducive to the public welfare.

The Indian Evidence Act II, of 1855, [s. s. 21 & 23] has not altered the law in this respect.

December 29. *Beaton v. Skene*, 29 L. J. Ex. N. S. 430, followed.

The plaintiff subpoenaed the Governor of this Colony, to produce certain documents and correspondence relating to the succession to the Throne of the State of Muar, and to certain allowances to be made to the members of the late Royal Family of that State, of whom the defendant was one. A great part of these documents and correspondence had been published in the Blue Book for the information of the general public. Plaintiff, the assignee of a sum of money, payable under a Treaty to the Sultan of Muar, and which he alleged was the identical sum now being allowed the defendant, commenced an action in this Court, against the defendant, in respect of this sum, and in order to prove the identity of the sum, subpoenaed the Governor to produce the aforesaid documents and correspondence. These papers were brought into Court by the Colonial Secretary, who declined, however, to produce them, on the grounds that his doing so, would not be conducive to the public interests, as they related to State affairs, and it would be contrary to good policy to do so.

Held, by the Court of first instance, that he could not be compelled to produce the documents.

Held, on appeal, by *Ford, J.*, that the judgment of the Court below was wrong, and the documents and correspondence should have been compelled to be produced, as the Government, by the very fact of publishing the papers and letters in the Blue Book, had given them publicity, and decided the question in favour of their admission in evidence.

Held, by *Sidgreaves, C. J.*, that the judgment of the Court below was right, and the fact of the publication in the Blue Book, made no difference.

The money payable under the Treaty to Sultan Allie, the Sultan of Muar, and by him assigned to the plaintiff was granted by the Tumongong of Johore to him, [Sultan Allie] “his heirs and successors” in consideration of certain arrangements in respect of the extent of country to be governed by each.

Held, by *Ford, J.* [and affirmed by the Privy Council, without expressing an opinion on the other points raised] that on the true construction of the Treaty, the grant did not confer such an interest in the money, upon Sultan Allie, or to enable him to assign it beyond the period of his own life. [a]

This was a suit to have it declared that the plaintiffs were entitled to a certain sum of five hundred dollars, originally payable monthly under a Treaty, by the Tumongong of Johore to the Sultan of Muar, under the circumstances mentioned in the statement of claim, which is set out at length in the judgment. The purport of the Treaty is referred to in the judgment of the Privy

[a] The Report of the case in the Privy Council, is taken *verbatim* from 8 L. R. App. Cases, p. 751.

Council given below. The further facts of the case, and the points raised at the trial, sufficiently appear from the arguments, and in the several judgments delivered in the case.

Davidson, [Bond with him] for plaintiffs.

T. Braddell [Attorney-General], *Joaquim* with him, for defendant.

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On this day, judgment was delivered by
Sidgreaves, C. J. The case on behalf of the plaintiffs is set out in the statement of claim as follows :—

"1. On the 1st day of June, 1860, His late Highness Sultan Allie Iskander Shah, the then reigning Sovereign of the territory of Muar, otherwise called Kassang, borrowed from Kavena Chana Shellapah Chitty, a British subject residing and trading in the Straits Settlements as a native Banker and Merchant, the sum of Dollars Fifty-three thousand six hundred [\$53,600] and by his bond of that date the said Sultan bound himself, his heirs, successors, executors and administrators in the penal sum of \$107,200, with a condition for making void the same on payment to the said Kavena Chana Shellapah Chitty of the said sum of \$53,600 at the expiration of one year from the date thereof and interest thereon in the meantime, monthly at the rate of 15 per cent. per annum, and for the better securing the payment of the principal sum and interest in the said bond mentioned and contained, the said Sultan by deed poll of the same date, for himself his heirs, successors, executors and administrators, granted, bargained, sold, assigned, transferred and made over to the said Kavena Chana Shellapah Chitty, his executors, administrators and assigns, a certain monthly sum of \$500 which, by a treaty of friendship and alliance between His Highness Sultan Allie Iskander Shah bin Sultan Hussain Mahomed Shah and His Highness Datu Tumongong Daing Ibrahim bin Abdul Rahman Sri Maharajah, dated the 10th March, 1855, was made payable by the said Datu Tumongong Daing Ibrahim bin Abdul Rahman Sri Maharajah, his heirs and successors, to the said Sultan Allie Iskander Shah, his heirs and successors.

"2. His Highness the said Datu Tumongong Sri Maharajah and his successor, His Highness Aboobaker the present Maharajah of Johore had due notice of the above assignment, and from the month of June, 1861 until the month of December, 1876, paid to the said Kavena Chana Shellapah Chitty as such assignee, the said monthly sum of \$500.

"3. His Highness the said Sultan Allie Iskander Shah, died on the 20th day of June, 1877 at Muar, or Kassang aforesaid, and His Highness Aboobaker, Maharajah of Johore, the successor of His Highness Datu Tumongong Daing Ibrahim Sri Maharajah, shortly afterwards assumed sovereign authority over the said Territory of Muar or Kassang, and the British Government has since recognised this assumption of sovereign authority to the exclusion of the defendant, who claimed to be the rightful heir of his father, the late Sultan Allie Iskander Shah.

"4. By deed of the date, the 18th September, 1880, the said principal sum of \$53,600 secured by the said bond and deed poll, and all arrears of interest due thereon, and all interest to become due for the same, and also the said bond and deed poll and the full benefit and advantage thereof, were assigned to the plaintiffs.

"5. The defendant is the eldest son and heir of the said Sultan Allie Iskander Shah, and is a British subject resident in Singapore, and is not a Sovereign Prince.

"The sum now due and owing on the said bond for principal and interest amounts to \$121,025.

"His said Highness Aboobaker, Maharajah of Johore, pays monthly to the Colonial Treasurer of the Colony of the Straits Settlements, the said monthly sum of \$500 under some arrangement with the Government of this Colony that His said Highness shall continue to pay the said sum of \$500 monthly

SIDDERAVES, to the said Colonial Treasurer, until it has been decided by a competent Court that the said Kavena Chana Shellapah Chetty or any person, or persons claiming under him is, or are entitled to the same. Under the said arrangement or some other arrangement the Colonial Treasurer is now paying the said monthly sum of \$500 to the defendant.

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"8. His Highness Aboobaker, Maharajah of Johore, is a Sovereign Prince and not amenable to the jurisdiction of the Courts of the Colony."

The plaintiffs claim,—

"1. A declaration that they are entitled to receive the said monthly sum of \$500 with any arrears thereon which may have accrued or may accrue until the amount due on the said bond is, with the interest thereon, fully discharged and satisfied."

"2. An account of what has been received by the defendant on account of the said monthly sum of \$500 since the death of the said Sultan Allie Iskander Shah and payment by the defendant to the plaintiffs of the sum so received."

"3. An injunction restraining the defendant from receiving either by himself or by his agents or agent the said monthly sum of \$500 and any arrears that may have accrued or may accrue thereon."

From this it appears that the plaintiffs claim under an assignment from one Kavena Chana Shellapah Chetty; and the manner in which his claim originated is set out in the 1st para. of the plaintiff's statement of claim. It is quite clear from it, that although the Chetty may have been a British subject, he advanced the money therein mentioned on a security, over which this Court could have had at the time no possible control. The bond given by Sultan Allie Iskander Shah, whatever effect it might have in the Territory of Muar, could have had no effect then in this Colony. As regards the assignment of the \$500 payable by virtue of the Treaty therein mentioned, it is quite clear also that neither over the treaty nor over the yearly sum payable by virtue of it, nor over the assignment of such yearly sum, could this Court exercise any control. If either or both of the contracting parties to the treaty had refused to be bound by it, or from the default of either, the \$500 per mensem was no longer forthcoming, the Chetty had no remedy except by an appeal to the sense of justice of the contracting parties. The Chetty must have been perfectly well aware of this at the time that he entered into the arrangements for the loan, and must be supposed to have made his calculations accordingly, and into those calculations the possibility of obtaining redress through the medium of this Court could hardly at that time have entered.

The 2nd para. sets out that after notice of the assignment, H. H. the said Dato Tumongong and his successor H. H. Aboobaker, the present Maharajah of Johore, paid the said \$500 monthly to the Chetty from June, 1861, to December 1876.

They might, however, have refused to recognize the assignment or to have anything to do with the Chetty, and have continued to make the payments to Sultan Allie. In that case the Chetty would have been dependent upon the good faith of Sultan Allie, and if he had thought fit to repudiate his debts or to postpone the payment of them to an indefinite period, it is certainly not to this Court that the Chetty could have looked for redress.

From the next paragraph it appears that on the death of Sultan Allie, H. H. the Maharajah of Johore became his succes-

son, and that although the defendant claimed to be the rightful heir of his father, his claims were not acknowledged. Had he succeeded, however, in establishing his claims there in his capacity of Sovereign Prince, the Court could have had no control over his acceptance or repudiation of his father's debts and liabilities. He might have entered into a new treaty with the reigning Sovereign of Johore, or insisted upon treating the assignment as a piece of waste paper, and it is quite clear that whatever redress the Chetty might have sued for either in Muar or Johore, he could by no possibility have expected any through the Courts of this Colony. The grounds upon which it is now sought to make the defendant liable upon the original assignment by Sultan Allie to the Chetty are set out in para. 7.

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The defendant does not admit any of the allegations contained in this paragraph, and sets out in his statement of defence, at considerable length, his account of the transactions therein referred to. Inasmuch, however, as they were not supported by any evidence, it becomes unnecessary to refer to them.

In support of the allegations in the 7th paragraph of the statement of claim, the Hon'ble Cecil C. Smith, the Colonial Secretary, was called as a witness by the plaintiffs' Counsel to produce a letter of the 29th July, 1881, addressed to himself by Mr. Bond, and 13 other letters and documents which His Excellency the Governor had been subpoenaed to produce, and for whom at the suggestion of the Court, adopted by the plaintiffs' Counsel, the Colonial Secretary attended. All of these he declined to produce, on the ground that the doing so would not be conducive to the public interests, that they related to affairs of State, and that it would be contrary to good policy to have them produced.

I decided that he was not bound to produce them, and for the purpose of having the case in as complete a form as possible, I will state briefly my reasons for so doing. By section 21 of Act II. of 1855 :

"A witness whether a party or not shall not be bound to produce any document relating to affairs of State the production of which would be contrary to good policy, nor any document held by him for any other person who would not be bound to produce it if in his own possession."

By Section XXIII ;

"Every witness summoned to produce a document shall, if the same be in his possession, custody, or power, be bound to bring it or cause it to be brought into Court, although there be a valid objection to the right of the party calling for it to compel its production or to the reading or putting in as evidence, or to the disclosure of the contents thereof ; the validity of any such objection made by the person producing the document shall be determined by the Court ; and for the better determination thereof it shall be lawful for the Court to receive any admissible evidence which the person producing the document may give respecting it, and it shall also be lawful for the Court, except in the case of any document relating to affairs of State, to inspect the document."

The Court being satisfied by the oath of a gentleman who from his position was so thoroughly qualified to form an opinion

SIDGEBAYES, upon the subject, that those letters and documents did relate to affairs of State, and that in his opinion the production of them would be contrary to good policy, had no alternative as it appears to me, but to decide that he was not bound to produce them. Under the 23rd section, if the Court is not satisfied of the validity of an objection to the production of a document, it may "receive any admissible evidence which the person producing the document may give respecting it," but if the document relate to affairs of State, it is not lawful for the Court to inspect the documents. There is literally nothing, therefore, for the Court to proceed upon except the evidence of the person producing the documents, and in the case of that person being, as in the present instance, the Colonial Secretary of the Colony, the Court would naturally come to the conclusion above stated. The point is very clearly explained in the case of *Beatson v. Skene*, 29 L. J. N. S., 430, where C. B. Pollock, in delivering the judgment of the Court, says:

"We are of opinion that if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a Court of Justice; and the question then arises, how is this to be determined? It is manifest it must be determined either by the presiding Judge or by the responsible servant of the Crown in whose custody the paper is. The Judge would be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service,—an inquiry which cannot take place in private, and which, taking place in public, may do all the mischief which it is proposed to guard against. It appears to us, therefore, that the question, whether the production of the document would be injurious to the public service, must be determined, not by the Judge, but by the head of the Department having the custody of the paper; and if he is in attendance, and states that in his opinion the production of that document would be injurious to the public service, we think the Judge ought not to compel the production of it. The administration of justice is only a part of the general conduct of the affairs of any state or nation, and we think that it is [with respect to the production or non-production of a state paper in a Court of Justice] subordinate to the general welfare of the community."

Notwithstanding the exclusion of this evidence, the plaintiffs' Counsel persevered in their attempt to prove the 7th paragraph of the statement of claim. It was contended that this monthly sum of \$500, being the Treaty money assigned to the plaintiffs, was now paid by H. H. the Maharajah of Johore directly or indirectly to the defendant, and that the plaintiffs were at all events entitled to the declaration they ask for, and for an injunction restraining the defendant from receiving it. The evidence adduced, however, has quite failed to satisfy me upon the point. Indeed the evidence given by Mr. W. H. Read points very much the other way. In his cross-examination by Mr. Davidson he says, "In June, 1878, I received a sum of \$500 for that month. I have received it up to date; it was paid to me by order of the Governor to pay to Tunko Allum's family—two sums, one of \$750, which the family refused to receive. I should say Tunko Allum did not claim it under the Treaty of 1855—as far as I am concerned, he did not so claim it—he declined the \$750 because it was offered as compensation—he received the \$500

because it had been paid for a long time. I received the money to be divided amongst the family:—Tunku Allum got \$300 a month, out of which he had to support his wife and family, his sister and 2 brothers. His mother received \$50 and his family at Malacca \$150 a month.”

What further light would have been thrown upon the case by the letters and documents which it was sought to put in evidence, I am, of course, unable to judge. The defendant's Counsel also complained of their exclusion as affecting his client's case, but as the matter now stands, the evidence seems to me to point to an abrogation of the Treaty and a new arrangement by which the money is paid for the benefit of the defendant and his family.

The plaintiffs have failed, I consider to make out any case for the intervention of this Court, and the verdict must be entered for the defendant.

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The plaintiffs appealed against this judgment.

5th April, 1882. The appeal was now heard before a divisional Court of Appeal, formed of *Sidgreaves*, C. J., and *Ford*, J.

Davidson, [Bond with him] for plaintiffs. Material evidence has been improperly rejected. The rejection arose on the examination of Mr. Cecil Smith, the Colonial Secretary, who was asked to produce a certain series of documents—thirteen in number: he declined to produce these documents on the ground that their production would not be conducive to the interests of Government. He believed their production would be against the interest of good government. As to certain documents for the production of which a *subpoena* had been addressed to the Governor, Mr. Smith stated that he appeared on behalf of the Governor and was instructed to decline to produce the papers called for as they related to affairs of State, and it would be contrary to good policy to produce them. Asked if he considered that documents which were published in the Blue Book came within the designation of “State secrets” he said he did not. Shown several documents in Blue Book relating to this case, he said he had no doubt they were correct copies. The Court held his reasons sufficient. The whole of this correspondence was laid before the Legislative Council, and several documents including all that the plaintiffs desire particularly to use, were in the Blue Book. They ceased certainly to be then State secrets if they ever could properly have been so described. Any man in the country could read them there in the Blue Book. The section of the Act, section 23 of Act 2 of 1855, referring to the exclusion of evidence, was never intended to apply to a case like this. The section was,—“Every witness summoned to produce a document shall, if the same be in his possession, custody or power be bound to bring it or cause it to be brought into Court although there be a valid objection to the right of the party calling for it to compel its production, or to the reading or putting in as evidence, or to the disclosure of the contents there-

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of: the validity of any such objection made by the person producing the document shall be *determined by the Court*, and for the better determination thereof it shall be lawful for the Court to receive any admissible evidence which the person producing the document may give respecting it, and it shall also be lawful for the Court, except in the case of any document relating to affairs of State to inspect the document." What was meant by a document relating to affairs of State, which it would be inadvisable to produce, was,—a document containing matter which it would be detrimental to the public interest to publish or make known; a State paper, the making public of which would endanger the public good. But these documents were already published, open to the whole community; published by the State itself. It is impossible to regard them as documents of the description protected by clause 23 of Act 2 of 1855. *Best on Ev.* 273, *Taylor on Ev.* 724. It was for the Judge to decide, and not the witness, whether the document is of that nature, and with that view to examine the witness. The question whether an annuity was assignable or not, hardly came within the case at all. The defendant was not appealing; he had got judgment in his favour, and it was not for him to now raise a new case, a totally different one from that placed before the Court in the first instance.

T. Braddell [Attorney-General], for defendant, went over the circumstance under which the annuity was assigned by Sultan Allie to the Chetty, remarking that the question was not, what the assignor intended, nor what the assignee expected to get; but, if, as was contended, the meaning of the assignment was, that the annuity in perpetuity was handed over, whether the late Sultan had not completely gone beyond his power in the matter, —whether or not the utmost that he could do was, to assign over his life-interest in the annuity. This could only be decided by referring to the terms of the Treaty of 1855, and this the Court could not do. The matter was beyond the jurisdiction of the Court. The question was not one to be settled by the narrow rules of Municipal Law, but by the broad rules of political or international law. His case was that when Sultan Allie died, his rights died with him. He could not, after he was dead deal with this portion paid to him of the revenues of Johore. For another reason this Court had no jurisdiction. The land of Johore, or the revenue from it, which was the subject of the assignment, is not now and never was within the jurisdiction of the Court, which is consequently unable to deal with the matter. The question was not whether the parties to this contract sued upon were British subjects or not, but whether this \$500 and the whole matter of its disposal were not the subject of a Solemn Treaty between the Maharajah of Johore and the British Government, and therefore a matter which this Court could not deal with. This case, on every ground, was one for the Courts of Johore or Muar and not for the Supreme Court of this British Colony. As to the \$500 now being paid to Tunku Allum, it was not the Treaty money. The Treaty money that Sultan Allie dealt with ceased to be payable and ceased

to be paid at his death. This \$500 was a sum in substitution of the Treaty money paid by the Maharajah to Tunku Allum, through an arrangement come to through the intervention of the Colonial Government. Because the sum was the same, the other side assumed it was the same money; but this was an entirely erroneous assumption. The evidence of Mr. W. H. Read negated that assumption; he told them money was not claimed by Tunku Allum under the Treaty, and that a fresh arrangement was made upon the death of Sultan Allie. The Treaty of 1855 was between the Maharajah of Johore and Sultan Allie, the Maharajah promised to pay the Sultan, in consideration of his surrendering certain rights to the Territory of Muar, \$500 per month, which was to be continued to his heirs and successors. But his son Tunku Allum was not his father's heir and did not inherit this \$500. The Maharajah himself was the Sultan's successor in the Sovereignty of the Territory. The Treaty lapsed on the death of the Sultan; the monthly payment of \$500 could no longer be paid; it would only be taking money from one pocket and putting it into the other. Certain arrangements came to be made on the Sultan's death for the support of the Sultan's family, &c., and provision was made for their maintenance by an arrangement which was completed between the Maharajah and the Colonial Government, on Her Majesty recognising His Highness as Ruler of Muar. As to the refusal of the Colonial Government to produce the correspondence called for by the defendant, correspondence connected with the completion of that arrangement providing for \$1,250 being placed at the disposal of the Government for the sustenance of the Sultan's descendants and relatives, that action was consistent with the position of the Government throughout, the Government had, in the political interests of the States, refused to give any assistance whatever to one side or another side in this litigation. In *Beatson v. Skene*, C. B. Pollock laid it down clearly that it was for the Government to judge, and not for the Court to decide, whether the political tendency of the production of any document would be injurious to the public good; the Government had full materials to enable them to say whether any document should be kept back as a State secret; the Court had no material whatever. Certain portions of a correspondence, a memorandum of the result of a correspondence consisting of a large number of letters, might be published for general information; and that with wisdom and benefit; while at the same time the production of the whole correspondence might be extremely inadvisable as likely to be detrimental to the public good. It was for the Government to decide what of its own documents, should be considered State secrets. The Government was the guardian of its own secrets, and should not be interfered with in so guarding them in the interests of the public good.

Davidson in reply. The Treaty was not for the Court to deal with; what was sued on was an assignment, which was admitted, of \$500 per month payable in perpetuity by the Maharajah, in the first place to Sultan Allie and at present to his assignees the appellants. But if the Treaty had to come before the Court, why, it

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was in evidence; it was sworn to by one of the witnesses; and the Court could interpret it. The Courts every day interpreted treaties of all kinds, extradition, patents, and so on. There was no information before the Court that when this treaty was made, the two parties were Sovereign Princes. His contention was that the contrary was the case. What Tunku Allum took under the treaty was as capable of being decided by this Court as by any Court in the world. This was the only tribunal that could deal with this case. Why should Tunku Allum or the Chetties go to Johore and submit themselves to the law there? How could they? They were British subjects, resident here, and certainly within the jurisdiction of this Court. The money was paid into the hands of persons over whom this Court had control; and who would respect the declaration of the Court that his clients were entitled to it in preference to Tunku Allum. The Attorney-General had ignored the Blue Book of course, but there was the Colonial Secretary's letter to Mr. Bond, in which he admitted that the Government was prepared to submit the legality of the Chetties' claim to the Supreme Court and to abide by the award of that Court. That letter placed the matter beyond a doubt as to what the intention was, and plainly told them that this money was the Treaty \$500, if indeed, there could be a doubt on that point after Mr. Willans' evidence. This, then, was the Chetty's evidence of what Tunku Allum himself said, when pressed to settle; "I am getting the \$500 now from the revenue of Johore, which is mortgaged to you. Wait till Mr. Read comes and we will go into the accounts and come to a settlement." After this the Court was asked to accept the statement that this was not the Treaty money. The Sultan had full power to dispose of the annuity as he had done. [The correspondence on this subject, published in the Blue Book, was then read at some length.]

Cur. Adv. Vult.

19th April, 1882. The Judges being divided in opinion on certain points, delivered their judgments *seriatim*.

Ford, J. In this case I differ from the view of His Honor the Chief Justice in the Court below, in not directing the Colonial Secretary to produce the two documents set forth in the Blue Book. Concurring entirely in the decision and reasoning in the case of *Beatson v. Skene*, I think that the action of the Government in publishing the documents in question has already decided the question as to their being such documents as, on the grounds of public policy, should not be produced in a Court of Justice, and that the evidence of the head of the Department in a contrary sense—evidence, in the nature of things, of opinion only—is one, therefore, which the Court, under such circumstances, is entitled to weigh. Had I weighed it, I should certainly have reached the conclusion that the previous action of the Government—authoritative, of course, superior to the head of the Department—had determined the question in a contrary sense and that the privilege to refuse production ceased. To the argument used in the

appeal,—*viz.*, that there might be other correspondence in the hands of the Government unpublished but, connected with that published in the Blue Book, and without which an erroneous view of the effects of the published correspondence might be taken, I think it sufficient answer to say that no evidence to that effect was given at the trial. I imagine also that such evidence would be unlikely to have been given in a case where selected documents of the kind are published with the view of giving the public a correct and not an erroneous view of the subject dealt with. I do not think that the section in our Evidence Act varies the duties or power of the Judge as laid down in the English cases. A question of some difficulty as to how far secondary evidence was admissible in case the Colonial Secretary had refused to produce the documents in question had the learned Judge ordered him to do so, might perhaps have arisen; but as this stage in the matter was not reached, I do not feel called upon to pronounce any opinion in the matter here.

Having these documents and the other evidence of the plaintiff and nothing but the evidence of Mr. Read for the defendant before me—for the defendant's statement of defence was not upon oath or supported by other evidence of any kind—I confess that a very strong conclusion has forced itself on my mind to the effect that the \$500 a month now paid by the Maharajah of Johore is the \$500 the subject matter of the Treaty of 1855; and had I to arrive at a conclusion in the case upon this being a correct view of the facts or not, I should have been compelled to differ from the decision of the Court below. I should also have done so had the right of the parties been decided upon a question of jurisdiction adversely to the jurisdiction of this Court, for I am clearly of opinion that as between the rights of the two private parties the objects of a Treaty, where both they and the subject matter of the Treaty, are within the jurisdiction, these rights can be adjudicated upon by this Court; but I do not understand the Court below to have given a contrary opinion upon this point, the observations made in the judgment having reference to what would have been the case whilst all parties to the Treaty retained their Sovereign rights, and to a period antecedent to the annuity being paid into the hands of persons here. Whilst differing, however, in the two first points from the decision of the Court below, I am compelled to concur in the substance of its decision, *viz.*—that the plaintiffs have no power to enforce against the defendant, the assignment from the late Sultan Allie of the annuity agreed to by the Treaty. Assuming the effect of the Treaty to have been a grant of \$500 to the Sultan "his heirs and successors"—I am putting the rights of the plaintiffs on the strongest ground by adopting that assumption—I am unable to see by what right the Sultan could have alienated more than a life interest in the grant. No doubt, on the authority of cases governed by English Law—a Law still containing many of the incidents founded upon feudal rights and customs—such words as the above have been held to have a technical sense and to pass absolute estates, and the first done has been held to have a full power of

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alienation. But that such was or is the effect of the use of such words in the law of Johore—by which, I apprehend, the words of this Treaty were to be construed—we have no evidence and in its absence I cannot import a meaning to them generally unknown, as far as I am aware, among Eastern nations, and which, read by any other light than English Law, would be a meaning quite contrary to that of the parties who used them.

For the above reasons whilst differing in some respect from the course taken by the Court below, I agree with the decision which it has given.

With reference to the right of the plaintiffs to appeal on the first and second grounds stated in their memorandum of appeal, on the objection having been originally raised by the Court and not having been pressed by the Counsel for the defendant, I do not wish to prejudice any right of the plaintiffs to an appeal on these grounds, should they take the case further, by an adverse decision of a Court constituted as this is,—by consent, and of two judges only. I think this question had better be decided by the full Court of Appeal, when actually contested; in this view I understand the Chief Justice to concur.

Sidgreaves, C. J. I concur in what has been stated by His Honor Mr. Justice Ford with regard to the grounds of appeal upon which this matter was argued before the Court. The further argument in the Court of Appeal has failed to convince me that the evidence rejected in the Court below was not properly rejected or that the judgment given was not in accordance with the evidence. As regards the fifteen documents alleged to have been improperly rejected in the Court below, the question as to the rejection of 13 of them, was not pressed, the main contention being that 2 letters were excepted from the rule of exclusion referred to in the judgment in the Court below, in consequence of their having been already published in the Blue Book of the Colony. My learned colleague takes a different view from that already expressed by me upon this point; but I have not been able to come to any other conclusion than that the same reasoning applied to these two documents as to the thirteen others. If it were for the judge to satisfy himself that the documents might be made public without prejudice to the public service, as Baron Martin thought, contrary to the opinion of the majority of the Court, in the case of *Beatson v. Skene*, referred to in the judgment in the Court below, then probably I should have felt it my duty to compel the production of those documents. But that case appears to me to establish that it is not for the judge to overrule the expressed opinion of the “responsible servant of the Crown in whose custody the paper is,” however much his own opinion may differ from it. In the present instance the Colonial Secretary must have been perfectly well aware before he attended in Court that a copy of those documents had already appeared in the Blue Book. Notwithstanding that, he pledged his oath that the production of those two documents would not be conducive to the public interests. It might very well be that the Judge at the trial when such a statement was

made did not very clearly see how that could be; but at all events it might be, and that was the sworn testimony of the Colonial Secretary that it was. Who was more likely to know whether it would be so, the Judge or the Colonial Secretary? Clearly, as it appears to me, the latter. It is not necessary, as it appears to me, to consider how this could be, whether as suggested by the Attorney-General as one mode of accounting for it, the production of those two letters alone without the production of others which could not be produced, would give an incomplete and fallacious aspect to the case. The possibility of it was not excluded. The question was broadly raised upon the Colonial Secretary's evidence whether or not the production of those documents was injurious to the public service, notwithstanding their appearance in the Blue Books. Who was to determine it? In the language of the case I have already referred to and quoted,—“the question whether the production of the document could be injurious to the Public Service, must be determined not by the Judge but by the head of the department having the custody of the paper.” This transfer of responsibility can hardly cease when the Judge entertains a different opinion from “the responsible servant of the Crown.” In that case there would be no transfer of responsibility at all. I remain, therefore, still of opinion that those two documents were properly rejected in the Court below. Those letters were not read in the Court below, but they were read in the Court of Appeal. On the question of their being “material” evidence, I do not consider that their admission would have in any way effected the judgment delivered in the Court below.

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The plaintiff appealed from this judgment, to the Judicial Committee of the Privy Council, on all the points, and these were severally argued before their Lordships; but as their judgment turned entirely on the construction of the Treaty, the arguments on the other points are omitted. The appeal was heard on the 6th January, 1883.

Present :—

LORD WATSON,
SIR BARNES PEACOCK,
SIR ROBERT P. COLLIER,
SIR RICHARD COUCH, and
SIR ARTHUR HOBHOUSE.

The *Solicitor-General* [Sir F. Herschell] and *Rigby*, Q. C., [Mayne, with them], for the appellants, contended that the interest of the Sultan Allie, in the monthly sum of \$500 was such as could be alienated, and that the applicants were entitled to satisfaction of their claim thereout. A grant to a sovereign, his heirs and successors, gives an absolute alienable interest. As regards sovereignty there is no distinction between public and private property with regard to these Eastern sovereigns: *Elphinstone v. Bed-*

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reached. [1] With regard to the law of Johore and the question whether under that law an absolute interest passed to the Sultan, no proof of the state of that law was given, and therefore it must be assumed to be the same as the law of England, by which a grant to the sovereign, his heirs and successors, vests on absolute estate in fee simple. There would be no remedy against the sovereign refusing to pay, but there is against the payee who has received the money. Reference was made to *Kinloch v. Secretary of State for India*. [2] The money was paid to the British Government under the treaty, and therefore for the benefit of whoever was entitled to it. There is nothing in the treaty to prevent alienation. The word "assigns" was not wanted; "heirs" was sufficient to create an absolute estate: *McCarthy v. Goold* [3]; *Earl of Stafford v. Buckley* [4]; *Wells v. Foster* [5]; *Willcock v. Terrell* [6].

The *Attorney-General* [Sir H. James], *Davey*, Q. C. and *Jewme*, for the respondent, were not called upon.

The judgment of their Lordships was delivered by
Sir Barnes Peacock :—

Their Lordships are of opinion that, on the true construction of the treaty, the \$500 a month stipulated to be paid by Sri Maharajah, his heirs and successors, to Sultan Allie, was not assignable by Sultan Allie beyond the period of his own life.

The object of the Treaty, as appears by the recital, was to put a final end to differences and disagreements which had subsisted between the two Rajahs relative to their respective claims on the territory and sovereignty of Johore, and to establish and maintain peace, friendship, and amicable relations between them. Though the words "heirs and successors" are not used in the recital, the object of the treaty was stated to be "to maintain peace, friendship, and thoroughly amicable relations between them from thenceforth in all time to come." The first article declared that "His Highness Sultan Allie, for himself, his heirs and successors, does hereby cede in full sovereignty and absolute property to His Highness Sri Maharajah, his heirs and successors for ever, the whole of the territory of Johore." The second article is:—"In consideration of the cession contained in the foregoing article, His Highness Sri Maharajah does hereby agree to pay immediately after the execution of these articles, to His Highness Sultan Allie, the sum of 5,000 Spanish dollars." With regard to that sum Sultan Allie had, no doubt, the power of disposing of it. It was to be paid to Sultan Allie himself. But then Sri Maharajah further engaged that he, his heir and successors, would from and after the 1st day of January, 1855, pay to Sultan Allie, his heirs and successors, the sum of 500 Spanish dollars per mensem. By the third article Sri Maharajah withdrew all claim whatsoever to the said territory of Kassang, describing it, and consented that Sultan Allie, his heirs and successors, should have and enjoy the same in full sovereignty and property for ever. The object of the treaty being to settle all disputes, the arrangement was that Sri Maha-

[1] 1 Knapp, 329, n.

[2] 7 App. Cas. 619.

[3] 1 B. & B. 387.

[4] 2 Ves. Sen. 171.

[5] 8 M. & W. 149.

[6] 3 Ex. D. 323.

raja should have the sovereignty of Johore, to him and his successors, for ever; and that Sultan Allie, and his heirs and successors, for ever, should retain the sovereignty over the territory of Kassang, and, in addition to the sovereignty of Kassang, he and his successors should receive from the Maharajah of Johore the sum of 500 Spanish dollars per month. Then Sultan Allie, by the fourth article, stipulated that the said territory of Kassang should not be alienated or disposed of to any party or power without the same being in the first place offered to the East India Company, and then to His Highness Sri Maharajah, his heirs and successors, on such terms as His Highness Sultan Allie, his heirs or successors, might be desirous to cede it to any one other party or power willing to treat for the same. That was merely a stipulation that, although Sultan Allie was to retain the sovereignty of Kassang to him and his successors, they should not alienate it without giving the preference to the East India Company or to Sri Maharajah to take it upon certain terms. The fifth article also appears to be important in considering whether the words "heirs and successors" were to include "assigns." It is in the words following: "The subject of each of the said contracting parties shall have full liberty to trade to and pass in and out of their respective territories," and so on; "and each of the said contracting parties, for himself, his heirs and successors, hereby solemnly engages to do no act calculated or having a tendency to promote or foment disturbances within the territory of the other of them, but in all respects truly and faithfully to adhere to and observe the engagements hereby entered into by them respectively." One object, as it appears to their Lordships, of that part of the treaty by which the Maharajah of Johore stipulated to pay the \$500 a month to Sultan Allie, and his heirs and successors, was that the payment should operate as an inducement to Sultan Allie, and his successors not to foment disturbances within the territory of Johore, the claim to which had been given up by Sultan Allie to the Maharajah of Johore.

Their Lordships are of opinion that by the term "heirs and successors" such an interest was not given to Sultan Allie in the \$500 per month as enabled him to assign or transfer it beyond the period of his own life. If he could do so, his heirs would have no pecuniary inducement to restrain them from acts calculated or having a tendency to promote or foment disturbances within the territory of Johore. Looking to the whole scope of the treaty, their Lordships are of opinion that Sultan Allie had no power to assign to the plaintiff the \$500 a month for a period beyond that of his own life. That life having ceased to exist, the plaintiff, who has to make out his title to the monthly payment, has wholly failed.

Their Lordships think that the judgments of both the Courts below were correct, and that this decree ought to be affirmed. They will, therefore, humbly advise Her Majesty to that effect. The appellant must pay the costs of this appeal.

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[Judgment of
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PENANG.

—
Wood, J.

1882.

—
February 7.

In order to obtain a new trial on the ground of surprise, it is incumbent on the party moving, to prove affirmatively and clearly, that taking the old evidence [already adduced] and the new, [sought to be adduced] together, the finding is erroneous.

It is too late and dangerous to permit such party, on the argument of the rule nisi, to supply additional facts in support of his case.

Semble. If a party taken by surprise, does not, at the time, apply for a postponement on that ground, but proceeds with the trial on the evidence he possesses, he is bound by the result.

Clutton, for defendant, had obtained a rule calling on the plaintiff to shew cause why a new trial should not be had on the ground, 1, of surprise, and 2, of inability to obtain the attendance of witnesses from causes beyond the defendant's control. The defendant's solicitor and counsel at the trial, made an affidavit and stated that he was not aware how the plaintiff claimed to be entitled to the jewelry claimed in the action, as the statement of claim did not disclose it, until the trial; and the line of evidence selected by the plaintiff for that purpose, entirely took him, and his client, by surprise—that during the trial they had subpoenaed witnesses, who either were unable from illness, or unwilling to come, and he had applied to the Judge who presided at the trial, to attach some of these witnesses for contempt, which application was not granted—that he believed there was now evidence forthcoming which would clearly establish the defendant's case, and contradict the evidence given by the plaintiff at the trial. There were four other affidavits, shewing certain facts relative to the merits of the case.

Thomas [*Kershaw* with him] shewed cause. The affidavit of the defendant's solicitor states only in general terms, that he is told evidence is forthcoming for the defence—he does not tell us what the nature of it is—the other affidavits also prove nothing. There was in fact no surprise, and no certainty of the facts forthcoming being in favour of the defendant to any material extent. The matter was really fully before the Court, and fairly decided. If the defendant had been taken by surprise, he should have applied for an adjournment of the trial—but having elected to stand the result of the trial, he is now bound by it. *Belle v. Thompson*, 2, Chitty's Rep. 194; *Harrison v. Harrison*, 9 Price 89, *Goldicut v. Bangin*, 11 Jurist 544; *Hardwright v. Badham*, 11 Price 383; *Edwards v. Digman*, 2 Dowl. 642; *Hennings v. Samuel*, 2 Dowl. 766; *Roberts v. Holmes*, 6 Scott N. R. 730; *Tharpe v. Stallwood*, 5 M. & G. 760, s. c., 1 Dowl. & L. 24. The affidavits should satisfy the Court that the finding was wrong. The evidence supplied by these affidavits is most meagre. There was ample time to have got evidence to meet the case; or not having it, to ask for a postponement. There is no surprise within the meaning of the term and the rule should be discharged.

Clutton, now asked permission to file an additional affidavit stating that he had examined certain witnesses, with statements of the result of their examinations, but not disclosing the names of the witnesses, or the details of the evidence, from the presumed danger of doing so.

Thomas objected to the reception of an affidavit at this stage of the proceedings.

[*Wood*, J., considered it was too late to file any additional affidavit].

Clutton supported the Rule. The cases cited are not in point as to postponement, for they have not the element of surprise, but simply the absence of a material witness. There was reasonable surprise here. The counsel for the defendant, thought he could go on with the evidence he had. The pleadings shewed him nothing of the plaintiff's case, and the defendant necessarily was at a loss how he intended to shape it, until the commencement of the trial. The surprise once existing, as no doubt it did, it continued all through the case, as the counsel for the defendant could not know for certain what evidence he had to adduce to meet the plaintiff's case as then set up; he also had to contend against the difficulties arising from the inability of some witnesses and unwillingness of others, to attend—this latter he brought to the notice of the Court when applying for an attachment against them, which was refused. If new evidence could be given, it would shew that the plaintiff's case is at least open to doubt, if it does not conclusively prove in defendant's favour. The affidavits of the defendant that we now have on the file, go far to shew that the finding was wrong. The fact that they do not state more is, not the inability of the defendant, at the time of their being drawn, to state more, but the great danger that is incurred by setting out the facts to be proved, with the names of witnesses and their evidence in detail.

Wood, J. I am of opinion the Rule ought to be discharged. The danger last suggested, I think, is also a reason against admitting fresh evidence after the trial. I incline to think, that the affidavits of the defendant do show surprise, but even then, an application might have been made for a postponement on that ground—that not having been done, I further incline to think, that the defendant having gone to trial on the evidence he possessed, he is bound by the result. I am far from thinking this was, by any means, an unwise discretion.

Presuming then, that there has been surprise on the part of the defendant, is he entitled on that ground only, to move for a new trial? I think not. I hold, that for the purpose of obtaining a new trial on that ground, it is incumbent on the defendant to prove affirmatively and clearly, that taking the new and old evidence together, the finding is erroneous.

As I decided incidentally, I consider it too late now, on the argument on the Rule, to supply additional facts; and with the evidence in the case before me, I am of opinion, that the new evidence adduced, or shewn to exist, is insufficient to satisfy me that my decision of the matters of fact, at the trial, was substantially wrong. The Rule will be discharged, with costs.

Rule discharged.

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LIM GUAN TEET v. SHAIK AHAMAD BASHAIB & ANOR

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1882.

February 9.

The bringing of an action is not a "presentation for payment," so as to require a foreign bill or note to be stamped under section 17 of Ordinance 8 of 1873, before it is received in evidence.

The affixing of chops to a promissory note, in lieu of signatures, is a sufficient signature of the note.

The Sultan of Acheen, a Sovereign Prince, was indebted to the plaintiff: in consideration of plaintiff releasing his claim on him, the defendants promised to pay the plaintiff a certain sum.

Held, there was sufficient consideration for the defendants' promise.

Where service of a writ of summons could not be effected, by reason of the Court having no jurisdiction to entertain the action,

Held, the case fell within section 13 of Act XIV. of 1859, and was not barred, though the note sued on, was more than six years old.

Section 13 applies to all cases, whatever may be the length, nature or circumstances, of the defendants' absence from the Colony.

This was an action to recover \$41,000 besides interest, due on a promissory note or agreement made at Simpang Olim, in Acheen, by Tunku Muda Niah and Tunku Maharajah of Teloh Samoy, the defendants' intestate. The document bore date 27th November, 1872 and had no stamp on it; there being then no stamp duty payable at Acheen. This action was commenced last year, and at the time it was commenced, the note remained still unstamped. There were no signatures to the note, but merely the chops or seals, with their respective names engraved thereon, of the two makers—this being the usual and ordinary way in which documents were executed at Acheen. The consideration for the note, as shewn by the evidence, was, the giving up by the plaintiff, of a large claim against the Sultan of Acheen, and accepting the defendants in his stead. The makers had never come within the jurisdiction of this Court, since making the note; and at the time the suit was commenced, were still abroad—they then, however, had property within the jurisdiction.

E. W. Presgrave, for defendants, objected to the admissibility of the note, as not being stamped before presentation for payment, under sections 8, 9, 10, 11, 12 and 15 of Ordinance XXVI. of 1867, and section 17 of Ordinance VIII. of 1873—[a] and submitted, that the bringing of the action, being, in law, a demand, it was a presentation for payment, and at that time the document was unstamped. *Byles on Bills*, [Ed. 1879] 219; *Rumbade v. Ball*, 10 Mod. 38; *Trampton v. Coulson*, 2 Wils. 33; *Norton v. Ellis*, 2 M. & W. 46; *McIntosh v. Hayden*, 1 Ry. & Moo. 362.

Van Someren, for plaintiff, submitted no stamp was necessary at all—that "presentation for payment" had a definite and

[a] Section 17 of Ordinance 8 of 1873, reads as follows: "The holder of any bill of exchange drawn out of the Colony and not having a proper stamp affixed thereon as herein directed . . . shall, before he shall present the same for acceptance or for payment, or shall endorse, transfer, or in any manner negotiate such bill, affix thereto, the proper adhesive stamp denoting the duty by this Ordinance charged on the amount of such bill . . . and the person who shall present such bill for acceptance or payment . . . shall before he delivers the same out of his hands, custody, or power, cancel the stamp so affixed."

intelligible mercantile meaning and operation—that the sections of the Ordinance referred to, were identical with 17 and 18 Vict., c. 83, s. 5—and *Griffins v. Weatherly*, 3 L. R. Q. B. 753, was conclusive on the point.

Presgrave in reply.

Wood, J. Under the assumption that the case is governed by the Stamp Ordinances of 1867 and 1873, and granting that an action is equivalent to a presentation for payment, yet the words of these two Ordinances must be looked at, and construed strictly, as acts imposing a duty ought to be construed, and with due reference to the known use of words. "Presentation for payment" is a well known mercantile operation; and must be held to mean, presentation in fact, and not the bringing of an action, although it may have the effect of a presentation for payment. The bringing of an action is not a presentation for payment according to the known acceptation of the term. I may refer to *McIntosh v. Heyden* as shewing that presentation of a bill for payment, or a demand in fact, is a well known incident at law, and the bringing of an action, without demand, is contrary to usage. The objection is overruled, and the document will be admitted.

The note was accordingly admitted. On the close of the plaintiff's case,

Presgrave submitted the plaintiff could not recover.

1st. As there was no signature to the note, but only a chop. *Story on Bills*, sections 11 and 35; *Chitty's Commercial Law*, p. 280, shewed that sealing was not a signature. The Statute of frauds required the promise to be in writing, as this was in effect a guarantee. 2ndly. There was no consideration for the note; the Sultan of Acheen, being a Sovereign Prince was never liable to be sued, and the giving up by the plaintiff, of his alleged claims against the Sultan, when in law, he had none—afforded, in law, no consideration for the defendants' promise. *Chitty on Contract*, 49, *Chitty's Commercial Law*, p. 66, 67. *Notes to Lamplough v. Brathwaite*, 1 Sm. L. C. 147-48; *Eastwood v. Kenyon*, 11 Ad. & Ell., 438. The utmost that could be said was, that the Sultan was morally bound, but that was no consideration. 3rdly. The debt was barred by the Statute of Limitation XIV. of 1859, section 1, clause 16. The defendants could have been sued, but no attempt is made to serve them with a summons till 1881, more than six years after the note fell due. Section 13 of the Act did not apply, [a] as here the defendants could have been served under sections 23, 29, 31, 32 and 34 of Ordinance V. of 1868—these sections were not repealed by Ordinance V. of 1873. *Rhodes v. Swethurst*, 4 M. W. 42, s. c., in error, 6 M. & W. W. 351.

Van Someren, for plaintiff contended, the mark or chop was a sufficient signature. *George v. Surrey*, Mood. & Mal., 516; *Baker v. Denning*, 8 Ad. & Ell., 94; *Geary v. Physic*, 5 B. & C. 234;

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[a] Section 13, Act XIV. of 1859, "in computing any period of limitation prescribed by this Act the time during which the defendant shall have been absent out of the British Territories in India shall be excluded from such computation unless service of a summons to appear and answer in the suit can, during the absence of such defendant be made in any mode prescribed by law."

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Bennett v. Brumfit, 3 L. R. C. P. 28. This was on the assumption the document was a note—but it was not necessary to contend it was a note, it was an agreement of guarantee, and was sufficiently signed with the chop. *2ndly*. There was ample consideration for the note: the Sultan was, in fact, relieved from the annoyance and vexation of a law suit—and even if he was not liable, the contract was a guarantee, and the consideration need not appear. The Sultan could be sued whether he would avail himself of his privilege was left with him—if he did not object, the plaintiff would recover judgment and execution against him. The right to object, was purely personal with the Sultan—here, he chose to acknowledge his liability, and the defendants thereupon came to his help, and signed in his stead. *3rdly*. The debt was not barred, as the defendants could not be served with a writ of summons personally. The Court now has jurisdiction under sections 18 and 19 of the Courts Ordinance III. of 1878, as the defendants have property within the jurisdiction, but before this Act, that fact alone gave no jurisdiction. *Khu Poh v. Wan Mat*, Straits Law Reports, p. 247. A summons could not be served under sections 31, 32 and 34 of Ordinance V. of 1868, as the Court had no jurisdiction; section 29 defines the jurisdiction, but this case fell within neither of its alternative provisions. There being no jurisdiction, no action could be brought here—no summons could be issued here, or served and the claim under section 13 of the Limitation Act of 1859 was not barred.

Presgrave in reply contended, that the Court had jurisdiction under section 29 of Ordinance V. of 1868, as “the subject of “the proceeding fell, on general principles of international law, “or comity, to be determined by the law of the Colony”—the plaintiff being a British subject, and in this Settlement, the whole six years.

Wood, J. I am of opinion that the document is properly executed as a promissory note, or if not as a note, as a contract between the parties. I am also of opinion that prior to 1879, “service of a writ of summons to appear and answer in this suit, “could not have been made in any mode prescribed by law,” as this Court then had no jurisdiction, and that consequently the operation of section 13 of Act XIV. of 1859 applied, favourably to the plaintiff. The second point, as to whether there was any consideration, was the only one on which, at first, I had any doubts. I think, now however, there was sufficient consideration for the defendants’ promise. It is not clearly shewn that the debt was due by the actual Sultan of Acheen, but by a person whom the persons have thus designated—nor has it been shewn, that by the law of Acheen—assuming he was the actual Sultan, he could not be sued. As has been pointed out by the counsel for the plaintiff, the objection to the exercise of jurisdiction, according to the English Law, rested entirely with him. If he did not choose to take it, the action against him would proceed. Here he acknowledged his indebtedness and liability, and requested the defendants to sign for him, which they did. The judgment will therefore be for the plaintiff on all the points taken—and for the full sum of

\$41,000 and interest, together with costs.

Against this judgment the defendants appealed on all the points taken, except the one on the Stamp Act.

29th April, 1882. The appeal now came on to be heard before the full Court of Appeal.

Ross, [*Presgrave* with him] for appellants mainly relied on objections 2 & 3. They cited *Chitty on Contracts* [10th ed.] p. p. 26, 27, 43, 48 & 470. *French v. French*, 2 M. & Gr. 644; *Payne v. Wilson*, 7 B. & C. 423, 426; *Johnson v. Nicholls*, 1 Q. B. 251; *Croft v. Beall*, 11 C. B. 172; *Jones v. Ashburner*, 4 East 455. On the point of the Statute, they contended, that section 13 of the Act XIV. of 1859 did not apply, to the case where, the defendants, from the time they made the note, to date of their being sued, never were within the jurisdiction—and cited *Haber v. Steiner*, 2 Bing. N. C. 202; *Williams v. Jones*, 13 East 439.

Van Someren, for respondent, was not called on.

Cur. Adv. Vult.

May 2nd. The unanimous judgment of the Court of Appeal was delivered by

Sidgreaves, C. J. affirming the judgment of the Court below, on all the points.

Judgment affirmed.

LIM GUAN TEET v. TUNKU AKOBE.

Where a defendant has been arrested under a writ of arrest, and it is intended to have him discharged from custody, on account of some defect in the proceedings,—the application, or the rule nisi, should be to set aside the order granting the arrest, and not the writ only. The Court, however, has no power under section 9 of the Ordinance V. of 1878, to order the application, or rule nisi, to be amended accordingly.

A plaintiff, *bona fide* intending to negotiate with defendant about certain business in pursuance of an offer to that effect on the part of the defendant, requested the defendant to come to Penang for that purpose. The defendant came. Owing to the defendant's conduct, the negotiation fell through, and the defendant thereupon was about to return to his country when the plaintiff, without any fraud, caused him to be arrested for a debt, altogether independent of the other business,

Held, he was not at liberty to do so; and inasmuch as, but for such the defendant's presence in the Colony, the Court had no jurisdiction to entertain the suit, the order of arrest, the writ of summons, and all subsequent proceedings, were set aside.

Semble. A foreign Sovereign Prince is not exempt from the jurisdiction of the Courts of this Colony, unless he is recognized as such, by the British Crown. [a]

Thomas, for the defendant had obtained a rule calling on the plaintiff to shew cause, why the defendant should not be discharged from custody and the writ of arrest, summons, and all subsequent proceedings herein, set aside, on the grounds: *1stly*, That the defendant was a Sovereign Prince and so without the jurisdiction of this Court, *2ndly*, That the defendant was not withdrawing himself from the Settlement within the meaning of section 422 b. of the Ordinance VIII. of 1880, *3rdly*, That the defendant had been induced by the fraud of the plaintiff to come over to Penang, and had, on his arrival, been arrested.

There were various affidavits and counter affidavits filed by

[a] See *Abdul Wahab &c., v. Sultan of Johore*, ante p. 298.

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both parties; the defendant's affidavits stating he was the Sovereign Prince of Pateh; and the plaintiff's, that he was not, that the question of the sovereignty of Pateh was still under the consideration of the Netherlands Government, and at all events the defendant was not recognised by the Government of the Colony, or the British Crown, as a Sovereign Prince. On the second and third objections, the defendant's affidavit stated, that he had been induced to come to this Settlement, from Pateh, in consequence of two urgent letters of the plaintiff, requesting him to do so with the view to his renting to the plaintiff certain farms at Pateh, and but for this inducement he would not have come here, and his intention to return was due, not to his wishing to avoid the process of this Court, but to return to his native country, as the plaintiff had not appeared willing to take the farms. The plaintiff's affidavits on this point, admitted the two letters, but shewed that they were written in consequence of a letter first received from the defendant, [which he subsequently admitted] in which he offered the plaintiff the farm, and asked for an advance of money—that the plaintiff had asked the defendant to come over here,—but did not do this with any fraudulent or improper motive, and the negotiations for the farms fell through, only on account of the exorbitant rent, and that, in advance, which the defendant wanted for them. The Dutch Consul appeared at an early stage of the case, and requested that the defendant should be allowed immediately to return to Pateh, as he had received instructions to make such application on the grounds that the reports from Pateh were disquieting, and complications between the Dutch and the people of Pateh would probaly ensue, involving loss of life and property, if he did not immediately return. He also made an affidavit that the defendant was an independent Prince, and Supreme Ruler in his State of Pateh and was so recognized by the Netherlands Government. The defendant was allowed to leave the jurisdiction on terms, and without prejudice to the motion and suit. The contract sued on was made abroad [at Pateh], and the case did not fall within section 19 of Ordinance 3 of 1878, except for the defendant's appearance within the jurisdiction. The rule now came on for argument,

Van Someren, for plaintiff, shewed cause.

1st. The rule should have been to set aside the order granting the arrest, and not the writ of arrest. This is a fatal objection. *Hopkins v. Salenbir*, 5 M. & W. 423, sections 9 and 151 of the Civil Procedure Ordinance V. of 1878, cannot avail.

Thomas asked leave to amend his rule under section 9.

Wood, J. considered that section 9 applied, and directed the amendment to be made, and adjourned the case for that purpose.

May 3rd and 4th, 1882. The amendment having been made,

Van Someren continued to shew cause. 1st. The defendant is not a Sovereign Prince. There is a treaty between the Crown of England and the Sultan of Acheen made in 1819, which shews that, at that time, and presumably since, the Sultan of Acheen is a Sovereign Prince, and was recognized as

such, and as an independent Prince. Since then there has been no recognition. The independent states, if any there be, which have arisen since the Acheen war, and the overthrow of the Sultan of Acheen, and from the ruins of his State,—as this one of Pateh—have not been recognized by our Government of the British Crown, and without such recognition, there is no State within the judicial knowledge of the Court, or that the Court can recognize if proved. *Wheaton's Inter. Law*, p.p. 20, 21 and 27. *Phillimore Inter. Law*, paras. 117-118, also p. 15, 25, 26 and 27, especially paras. 21 and 22 in page 25. *City of Berne v. Bank of England*, 9 Vesey, 347; *Dolder v. Bank of England*, 10 Ves. 352, s. c. 11 Ves. 283; *Thompson v. Powles*, 2 Simons Rep. 194; *Taylor v. Barclay*, *Ibid.* 213.

2ndly. The contract on which he is sued is not an act of state. The defendant chooses to go into private speculations, and is liable for his private contracts. *Munden v. Duke of Brunswick*, 10 Q. B. 656; *Wadsworth v. Queen of Spain*, 17 Q. B. 171, 215-16, *Emperor of Brazil v. Robinson*, 5 Dowl. 522.

3rdly. There was no fraud in this case. The letters were written by the plaintiff to the defendant *bona fide*, and but for the defendant's own conduct, the negotiation for the farm would have terminated successfully. This, however, fell through, and the claim of the defendant on the present contract, is quite distinct from and independent of that mentioned in the letter. The plaintiff cannot be prevented enforcing his remedies here on this contract, when the defendant won't pay him—simply because in some other business matter he was instrumental, acting *bona fide* in bringing defendant within the Settlement. The case of *Stein v. Valkenhuyzen*, 27 L. J. Q. B. 236, which was cited on moving for the rule, is clearly distinguishable; as there it was a fraud and a sham on the part of the plaintiff, and was not denied by him.

4thly. The defendant's leaving is an absconding within the meaning of section 422 b. of the Ordinance V. of 1878—*Lamond v. Biffe*, 3 Q. B. 910.

Thomas in support of the rule.

It is not necessary that there should be an actual recognition—a virtual recognition is sufficient. *Phillimore*, p. 15; and that much our Government has certainly done.

[*Wood, J.* The authorities seem to lay down, that recognition is first necessary, before this Court can hold the defendant exempt. I don't at present see there has been any recognition, but if the occasion require it, will the parties consent to my enquiring of the authorities, if there has been any communication between the Dutch Government and the Crown of England, relative to the independent state of Pateh in Acheen, and if so what?]

The parties agreed to this.

2ndly. There was fraud on the part of the plaintiff, or at least attempted by the inducement held out to the defendant to come within the jurisdiction in his two letters. The case of *Stein v. Valkenhuyzen* is not distinguishable from the present case.

3rdly. The plaintiff is estopped by the contract and by the

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letters, from saying the defendant is not a Sovereign Prince, and the contract sued on not an act of State ; as the contract is with the defendant as the ruler of the country, for the whole of the pepper of certain districts, which, the affidavits shew, could only be dealt with by the Ruler and Prince of the State.

4thly. At all events, if he is not estopped from denying this, and there is no fraud, still he is estopped from proceeding against the defendant, who he brings within the jurisdiction, and but for which fact this suit would not lie here. The plaintiff impliedly undertakes by his letter, to use no hostile proceedings against the defendant by asking him to come here:

Wood, J. It is unnecessary for the Court to express any opinion on most of the points which have been argued, as I am of opinion that objection 2 has been satisfactorily urged in favor of the defendant, *vis.*, that he had been induced to come within the jurisdiction of the Court, under representations which are reasonably held to engage, that offers contained in his letter, would be favourably considered, and he should not be treated hostilely in the matter of this suit. I don't think the plaintiff's conduct fraudulent; but I hold, it is not competent to him, he having induced the defendant to come within the jurisdiction for one purpose, and by his acts and conducts led the defendant to believe, and to act, in good faith, on the supposition that he meant to be friendly—afterwards to change his ground, and take him on a *capias*, as for the original cause of action. The Rule will be absolute to set aside the order for arrest and writ of arrest; the summons and all subsequent proceedings will also be set aside, as but for the defendant's being within the Settlement, this Court could have no jurisdiction.

Rule absolute.

HIN LEE & CO. v. COHEN.

PENANG.

WOOD, J.
1882.

May 4.

Where an auctioneer under a misapprehension of the real facts attending the sale, knocked down an article to a person he supposed to be the highest bidder, but after so doing he was made aware of the true state of things, whereupon he declined to enter the name of such supposed purchaser into his book, as the purchaser, or to make delivery of the goods to him,

Held, although the hammer was down, he was not the agent of the supposed purchaser, so as to be liable for not making a binding contract for him—nor was he liable or not making delivery of the goods.

This was an action to recover \$500 damages for non-delivery of 50 cases of butter, or in the alternative, the same damages, for refusing to make a binding contract for the sale of the said cases. The evidence shewed that the defendant, who is an auctioneer, had been instructed by Messrs. Boustead & Co., to put up for sale sundry articles, on their account; that among other articles so offered were these cases of butter, but the defendant was instructed not to knock them down without the consent of a clerk who Messrs. Boustead & Co., had placed in charge. The butter was a long while being bid for, and the auctioneer, supposing for some reason, that the clerk had assented, knocked the butter down to

the plaintiffs, supposing the highest bid was theirs. He subsequently found the plaintiffs were not the highest bidders, and the clerk aforesaid also stating he did not assent to the butter being knocked down at the figure then named, the defendant refused to enter the name of the plaintiffs in his book, as the purchasers, and on reference to the manager of Messrs. Boustead & Co., the latter refused to allow the butter to go at the figure named for it. The defendant therefore neither entered the plaintiffs' name in his auction sales book nor delivered the butter, but attempted to re-sell same, when, owing to the dispute, the various bidders left and no second sale could be had. The plaintiffs alleged that when the butter was knocked down to them by the defendant, he handed them a tin as part delivery; this the defendant denied, alleging the tin was taken off the table by the plaintiffs, during the dispute. The sale was declared to be "to the highest bidders." The highest bid was made by a person [Jumansah] on behalf of Messrs. Boustead & Co., with the object of buying in the butter.

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E. W. Presgrave, for plaintiffs contended that as the sale was to the highest bidders and not under a reserved price, there could be no buying in of the goods; that the defendant as auctioneer was agent for vendor as well as purchaser, so soon as the hammer was down, and as the purchasers' agent, he was bound to have made delivery to them—who were, but for the man Jumansah—the highest bidders; or should have signed the sales book so as to make a binding contract. He cited *Pearse v. Corfe*, 9 L. R. Q. B. 210; *Benjamin on Sales*, p. 201, 202; *Emerson v. Heelis*, 2 Taunt 38; *Mainprize v. Westley*, 6 B. & S. 420; and *Warlow v. Harrison*, 28 L. J. Q. B. [N. S.] 18, on appeal 29 L. J. Q. B. [N. S.] 14. He also contended that, in fact, there had been a part delivery of the one tin of butter.

Van Someren, for defendant contended that on the point of delivery, in fact, the defendant's case was the true one, and as regarded the points of law, the auctioneer was not in all cases, by the fall of the hammer, the agent for the purchaser; each case stood on its peculiar circumstances—and cited *Benjamin on Sales*, pp. 202, 203, 204. Here the knocking down of the hammer, and declaring the plaintiffs the highest bidders was a mistake; the whole thing was done under a misapprehension of the real state of things; there was, in law, no contract as there was the absence of consent with full knowledge, and the Court would not assist the plaintiffs in getting what was nothing more than an attempt to get and take advantage of, the defendant's mistake.

Presgrave in reply.

Wood, J. I find, as a fact, that the plaintiffs have not made out their case that they were the purchasers for the butter,—but on the contrary, I am of opinion, on the evidence, that Boustead & Co., through Jumansah, were the highest bidders—or in other words, that the goods were bought in. I also find as a fact, that there was no part delivery of the butter. The whole affair seems to have been a mistake. The butter was knocked down to the plaintiffs under a misapprehension of the true state of facts, and to hold the defendant liable in such a case, would be to go beyond

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any case that has yet been decided. There was an entire absence of assent—that is, an assent knowingly given, with full knowledge of the facts—and there is therefore no contract. The defendant also, cannot, under the circumstances, be held the agent of the purchasers, so as to make a binding contract for them. The plaintiffs' case has failed in every respect, and the judgment must be entered up for the defendant, with costs.

OH WEE KEE v. BOON BONG NEOH & ORS.

PENANG.
—
FORD, J.
1883.
—
May, 10.

Where certain persons were entitled to life estates in certain premises, but during the continuance of such life estate, the Municipality, under Act V. of 1857, took possession of the premises for a public purpose, and paid compensation therefor,

Held, the life estates were not thereby put an end to, but the tenants for life were entitled to an apportionment of the compensation paid, in respect of their life interests.

At the time the arbitrators were making their award as regard the compensation to be paid for the premises taken, the life tenants waived their claim to apportionment, and requested the arbitrators to make none in respect of their life interests: they subsequently, in this suit, claimed apportionment.

Held, they were entitled to same.

A testator gave all his property, real and personal, to his executors upon trust to sell the same, [excepting certain houses] and then gave certain specific legacies out of the proceeds of such sale, and gave "the rest, residue, and remainder of his property" to certain charitable objects—with respect to the premises, he then proceeded to direct, that these should be kept for certain purposes. Those purposes, except as to a small portion, failed to take effect and were void.

Held, the houses, on termination of the purposes for which the small portion took effect, did not thereafter fall into the residuary clause: that the residuary clause was of a limited character; and the houses, except as aforesaid, were undisposed of.

These houses having been taken over for a public purpose and compensation paid therefor, and this compensation apportioned among the persons entitled to life interests, [which was the small portion which took effect,]

Held, the residue of the proceeds or compensation, also did not fall into the residuary clause, but was undisposed of.

The testator died without any known next-of-kin, but by his Will had devised his property to Trustees upon trusts, which were either incapable of taking effect, or were void.

Held, the property was undisposed of, and notwithstanding the presence of the Trustees, escheated to the Crown.

Read v. Steadman 26 Beav. 496, followed; *Sweet v. Sweet*, 33 L. J. Ch. N. S. 211, distinguished.

When costs of all parties are given out of the testator's "general estate," every portion of such estate is liable to contribute towards such costs.

This was a special case stated by the parties in order to have the proper construction of the Will of one Boon Ah Too deceased, dated 21st day of May, 1858, and of a codicil thereto, dated 11th August, 1858, of which the plaintiff was executor, and to have the rights of the various parties interested, declared. By his Will, the testator appointed the plaintiff and two others, his executors, who proved the said Will, and Probate was granted to them. The plaintiff was the surviving executor at the time of this suit. The testator after nominating his said executors and appointing them guardians of the persons and estates of his adopted children, devised and bequeathed unto his executors, their executors, administrators and assigns, all his real and personal estate whatsoever and

wheresoever, upon certain trusts, that is to say, upon trust as soon as conveniently might be to collect and call in all debts and monies due to him and to sell and dispose all and every his property of which he might die possessed of [except the house in Beach Street where he was then living] which he described by parcels, and particulars, [and three houses in Pitt Street] which he also described, [and which he directed should be reserved for purposes thereafter directed,] and from the proceeds of the same, together with all his ready money, to pay his debts, funeral expenses and certain specific legacies, and then proceeded as follows :—" And as to the rest, residue and remainder of my estate "and effects after being converted into ready money, my executors will invest the same at interest in good security of landed property, and the interest that may be derived thereby be given "and distributed as charity to the indigent poor as also to supply "coffins when they die, as I am in the habit of doing. With "respect to my aforesaid house in Beach Street and all the furniture that are therein I desire that the same be kept for the "use of my aforesaid adopted son and daughters [the defendants] "and Chew Sin Yew [who was then dead] who is also my adopted son, free of any rent or charge, but they, the occupiers, are to "keep the house in proper repairs and pay all taxes thereon as "well as quit-rent, and they will also defray at their own costs "and charges the expenses for the performance of yearly prayers "for me according to the Chinese rites and customs. And as to "the aforesaid three houses in Pitt Street, I desire that two of "them be kept and let out as at present, and the rent thereof be "appropriated for the benefit of the poor as aforesaid and the "other remaining house be kept for the use and occupation of the "poor as at present. It is my particular wish that my aforesaid "house in Beach Street, and the three houses in Pitt Streets, "shall not be sold or disposed of by my executors, but be kept "and appropriated as herein described." By the aforesaid codicil to his Will, the testator after directing the same to be taken as part of his Will, revoked one of the specific legacies in his Will, and then proceeded "and I do direct the same to be reverted into "and be appropriated as the rest and residue of my estate and "effects as directed in the said Will." The testator was a widower and had no children of his own—those he referred to were all his adopted children. At the time of his death he had not, nor had he at the time of the suit, any known relatives or next-of-kin in Penang or elsewhere. The adopted children for some time after the testator's death, resided in the house in Beach Street, but subsequently removed therefrom, and rented the same out to various tenants. Their right to do so having been questioned by the executors, a suit [No. 33 of 1876] was commenced by the present defendants against the present plaintiff and his co-executor who was then alive, praying to have it declared that they [the then plaintiffs] were under the said Will, joint tenants in fee of the said house in Beach Street and as such were entitled thereto. The executors in such suit maintained

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that the devise of the house was void as being in perpetuity and in restraint of alienation, and they claimed and submitted that the same ought not to be so declared, and to go into the residuary clause and be decreed to be sold and the proceeds applied to the charitable purposes therein declared. At the trial of the said suit on the 23rd November, 1876, this Court [Phillippo, J.] declared that the testator's adopted sons and daughters took equitable estates for life, as joint tenants, in the said house in Beach Street, free from all restrictions, but declined to pronounce any decision then, as to who should take, or what should be done with the said property, after the termination of such equitable life estate. Thereafter the adopted sons and daughters rented out the said house, and enjoyed the rents and profits thereof until shortly before this case, when the building being so old and out of repair as to be dangerous to the public safety, the same was directed to be pulled down by the orders of the Municipal Commissioners. A short while after, the defendants put up a building which however they left unfinished and subsequently the Commissioners being desirous of improving the Street, applied under the Indian Act VI. of 1857, to the Government of the Colony, to take the same, for such public purpose. On the 27th November, 1880, the plaintiff and the defendants were served with notices from the Collector of Land Revenue that the land was so about to be taken over, and requested them to name their arbitrators to set a value on the property—arbitrators were appointed and they awarded the sum of \$7,000, as compensation to be paid for the land, and \$800 for the unfinished buildings put up by the defendants. At such enquiry by the arbitrators, the defendants waived all claims in respect of compensation for their life estates, and requested that no apportionment should be made in regard thereto. Disputes having thereafter arisen as to who were entitled, and in what proportions, if any, to this sum of \$7,000, the amount was detained by the Collector of Land Revenue until the decision of this Court on this special case. Four questions were, on these state of facts, raised for determination by the Court.

1. Whether the devise of the house in Beach Street, became by reason of the act of the Commissioners, incapable of taking effect.

2. If it had, whether according to the true construction of the Testators' Will, the defendants, [the adopted children, and devisees of the house, for life,] could claim the proceeds of the house and land in lieu thereof; and had they any interest in such proceeds, and if so, what interest.

3. If the devise of the house was incapable of taking effect, and the proceeds thereof could not be substituted therefor, and the defendants had no interest in such proceeds, whether such proceeds fell into the residuary clause of the Will.

4. If the proceeds did not fall into the residue, who was entitled thereto.

The Crown claimed the residue of the proceeds, and intervened as a party.

Van Someren, for plaintiff. The decree of this Court in 1876 can be reconsidered, as to whether the defendants really had a life estate in the house.

[*Ford*, J. thought that as that decree had not been appealed against, it could not now be interfered with].

Even if they had a life estate in the house, as the house has ceased to exist by title, paramount, their life estate ceases with it. *Palmer v. Fowler*, 13 L. R. Eq. 250; *Wards' Trust*, 7 L. R. Ch. Appls. 727. That devise has become incapable of taking effect. 2ndly. The defendants are not entitled to the proceeds in lieu of the house. *Palmer v. Fowler and Ward's Trust*-suprà. The defendants before the arbitrators waived their claim to apportionment thereof, in respect of their life estates, and cannot now be allowed to claim it. 3rdly. The proceeds fall into the residuary clause. Wills Act, XXV. of 1838; section 21; 1 *Jarman on Wills*, p. 75. The excepting of property from the residuary clause, does not prevent such property falling into the residue, if the clause relating to same is void, 1 *Jarman* [3rd edition] 726, *Evans v. Jones*, 2, Coll: Ch: Cases, p. 516; *James v. Irving*, 10. Beav. 276; *Wain v. Field*, Kay. 507; *Morgan v. Boyce*, 3 My. & Cr. 661; *Hawkins on Wills*, p. 42. The residuary clause here constitutes a good charity. 4thly. If it does not fall into the residue, as there are Trustees, the Executors,—the Crown cannot take. The proceeds cannot escheat to the Crown. *Sweet v. Sweet*, 33, L. J. Ch. N. S. 211.

E. W. *Presgrave*, for defendants contended that the defendants were entitled to apportionment in the proceeds in respect of their life interest, and cited *Jeffreys v. Conner*, 28 Beav. 328; *Richard v. Moore*, 27 Beav. 629; *Midland Counties Ry. v. Oswin*, 1 Collyer, 74; and *Ex-parte Flamant*, 1 Simon. N. S. 260. He also contended that the residue of the proceeds escheated to the Crown.

Ross, for Crown. I.—There must be an apportionment of the proceeds among the tenants for life. II.—The residue of the proceeds does not fall into the residuary clause, as that is of a limited character—the houses are expressly excepted from its operation. The codicil confirms this view, it speaks of the residue “as directed in the said Will.” III.—The residue of such proceeds escheated to the Crown. There are no next-of-kin here, and this is a case in regard to personality. In *Sweet v. Sweet* it was held that the Trustee was Trustee for the heir at law, and although until then no heir had been discovered, the report does not say that the heir was not eventually found. Here the special case states expressly, there are no heirs or next-of-kin of the Testator. *Sweet v. Sweet* is also distinguishable as being a case relating to real estate. This case is governed by *Read v. Steadman*, 26 Beav. 495, and the residue escheats to the Crown. *Lewin on Trusts*, 50, 234 is to the same effect.

Van Someren in reply.

Ford, J. considered that the defendants were entitled to apportionment of, or at least interest on, the sum paid for the land, by the Municipality, in respect of their life interest, but as there was some difficulty on what principle to make the appor-

Ford, J.
1882.

OR WEE KEE
v.
BOON BONG
NEOH
& ORS.

FOAN, J.
1882.
—
ON WEE KEE
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BOON BOWE
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& ORS.

tionment, he gave leave to the parties to apply on the subject, if they differed among themselves and the Crown. The residuary clause, he was of opinion, was of a limited character, and the residue of the proceeds, after the apportionment, did not fall into same, but was undisposed of: that the disposal of the residue of the proceeds, was governed by *Read v. Steadman*, and escheated to the Crown: the case of *Sweet v. Sweet* he considered, distinguishable on the grounds pointed out by Mr. Ross. The costs of all parties he directed should come out of the general estate.

21st August, 1882. The parties having agreed on the principle of apportionment,—that the Crown was to take 10% on the \$7,000, and pay the residue to the life tenants,—*Presgrave* took out a summons directing the apportionment on such principle, and for an order that such amount be paid the defendants, which now came on before *Wood, J.*

E. W. Presgrave, for the defendants.

D. Logan, [*Solicitor-General*] for the Crown.

The apportionment, and order for payment, were made accordingly. The parties, however, differed as to the fund from which the costs of the suit was to come out. The defendants and the Crown contending it would not come out of the fund of \$7,000, but out of the monies in the hands of the plaintiff, as executor under the residuary clause. The question was then discussed, at the same time.

Van Someren, for plaintiff, the executor, claimed that the \$7,000 should also be liable to contribute towards the costs.

Presgrave, for defendants.

D. Logan, [*Solicitor-General*] for the Crown.

Wood, J. held, that as costs had been directed by Mr. Justice Ford to be paid out of the "general estate," it must be understood to mean that the costs were to be paid out of the general estate, thereby including the residue of \$7,000,—after deducting the \$700,—the portion falling to the Crown.

Order accordingly.

PALANIAPAH CHETTY v. LIM POH.

PENANG.
—
WOOD, J.
1882.
—

July 14.

A promissory note made and stamped under the Stamp Ordinance 8 of 1873, but having such stamp cancelled only with the maker's name, is not admissible in evidence under section 9, sub-section 3 of the Stamp Ordinance 1831; nor under the repealed Ordinance 8 of 1873, under which it was made.

The fact that the action, on the note, was commenced when the Ordinance of 1873 was still in operation, and that such Ordinance was repealed *pendente lite*, makes no difference.

This was an action against the defendant, one of the makers of a joint and several promissory note, dated 2nd May, 1876, to recover \$1,800, and interest. The note was made during the time the Ordinance VIII. of 1873, relating to stamp duties, was in op-

ration; and the stamp thereon was a receipt stamp of three cents, [being the then proper stamp duty] but such stamp was only cancelled by writing over it the name of the maker. By the Ordinance, section 25, no document was to be admissible in evidence unless "duly stamped"—and "duly stamped," in instrument of this nature and class, meant, stamped with a stamp of proper value, and such stamp cancelled by name or initials written thereon, *together with the date of so cancelling*. The action was commenced in 1881, but was adjourned on the 20th October of that year, in order to await the result of the appeal in *Allen v. Meera Pullay & ors.* [a]. During the adjournment, the stamp Ordinance II. of 1881, came into operation. The case now came on for hearing, and the note was tendered in evidence, and objected to by defendant.

Van Someren, for plaintiff.

Ross, for defendant.

Cur. Adv. Vult.

September 11. *Wood, J.* This was an action brought by the plaintiff, against the defendant on his promissory note for \$1,800.

On the note being tendered in evidence, Mr. Ross, for the defendant contended, that it was inadmissible for want of a stamp properly cancelled. The note in question, made in 1876, was stamped with a stamp of the proper amount, and was cancelled by the name of the maker, but not the date, being written over it. It was admitted that the name was so written at the time of the making of the note, and the only question for the Court was whether, under such circumstances, the note was properly admissible in evidence.

Mr. Ross contended that it was not so admissible because, under the Old Stamp Ordinance No. VIII. of 1873, promissory notes, if not stamped with the proper stamp, and cancelled in the manner pointed out by that Ordinance, *viz.*, the writing of the name or initials *together with* the date, at the time of the making, could only be rectified, so as to neutralize this error, and omission, and make them receivable in evidence, within three days from the day of the making, and that, such not having been done, nothing in the new Ordinance No. II. of 1881 would render it admissible.

Mr. Van Someren for the plaintiff maintained, on the contrary, that the note was admissible in evidence.

On the objection raised by Mr. Ross, that the note in question should have been rectified within three days of the date of its being made, I entertain no doubt. Sections 12, 21, 25, 26, 30 and 31 of Ordinance VIII. of 1873, sufficiently establish this point; the only question on which I entertained any doubt was, whether the new Ordinance, No. II. of 1881, enables the plaintiff to put this note in evidence. The sections of the New Ordinance II. of 1881, material to my judgment though given not in numerical order, are as follows:

Section 32 enacts that:

"No instrument chargeable with duty shall be admitted in evidence for any purpose, unless such instrument is duly stamped.

"Provided that

[a] ante p. 394.

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1882.

PALANIAPAH
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LIM FOH.

WOOD. J.
1883.
—
PALANIAPAN
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v.
LIM POW.

1. "Any such instrument not being an instrument chargeable with a duty of 3 cents only, or a Bill of Exchange, or Promissory-note, shall be admitted in evidence on payment of certain amounts by way of penalty."

The words "duly stamped" are not defined in the body of the Ordinance with exact reference to this section, as they formerly were in section 12 of the older Ordinance VIII. of 1873; but by the interpretation section of the present Ordinance of 1881, section 1, "unless there is something repugnant in the subject or context."

[9.] "Duly stamped" as applied to an instrument, means stamped, or written upon paper bearing an impressed stamp, in accordance with the law in force in the Colony when such instrument was executed or first executed.

By section 15 of the present Ordinance of 1881:

"Subject to the provisions of the next succeeding section, all instruments chargeable with duty, and executed by any person within the Colony, shall be stamped before, or at the time of execution."

Section 16, the next succeeding section, refers to instruments unstamped, or not sufficiently stamped "and requiring an impressed stamp"; which may be stamped by the Collector, within three days, if satisfied that the omission "to stamp has not arisen from intent to evade the stamp duties." A section which does not affect adhesive stamps.

By section 36, as to "Rectification," after enacting that any instrument chargeable with duty and not duly stamped, may, under certain circumstances, be rectified by the Collector, expressly states, by way of proviso, "that nothing in this section applies to an instrument chargeable with a duty of three cents only, or to a Bill of Exchange, or Promissory Note, if not produced to the Collector within 14 days from the day of its execution, or first execution, or the date of its arrival in the Colony, if executed out of the Colony."

Section 9 is as follows:

"I.—Whoever affixes any adhesive stamp to any instrument chargeable with duty, and which has been executed by any person, shall, when affixing such stamp, cancel the same, by writing, or marking distinctly the date in ink, either wholly on the stamp, or partly on the stamp, and partly on the paper on which the stamp is affixed; or in such other manner as the Governor or in Council may, from time to time direct, so that the stamp cannot be used again.

"And whoever executes any instrument on any paper bearing an adhesive stamp, shall, at the time of execution, unless such stamp has been already cancelled in manner aforesaid, cancel the same in manner aforesaid; so that it cannot be used again.

"II.—Any instrument bearing an adhesive stamp, which has not been so cancelled; so that it cannot be used again, shall so far as such stamp is concerned, be deemed to be unstamped.

"III.—The stamp or stamps upon any instrument, produced after and executed before the passing of this Ordinance; shall be deemed to be duly cancelled, if cancelled as prescribed by this section; and the instrument shall be deemed to be duly stamped; if it be shewn to the satisfaction of the Collector, or of a Court, or person having by law or consent of the parties, authority to receive evidence, that, at the time of the execution of the instru-

"ment, a stamp, or stamps of the proper value was, or were affixed on the instrument; and, if so satisfied, the Collector shall, on application by the holder, or other person producing the instrument before him, certify the same by writing, or causing to be written on the instrument the words "duly stamped"; and shall add his signature or initials thereto, and the day, month and year on which the signature or initials was or were written."

WOOD, J.
1882

—
PALANIAPAH
CHETTY
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Holding, in obedience to what I cannot but consider sound principles of jurisprudence, that fiscal acts are intended to protect the *Revenue* against the non-use of stamps, where stamps are required, and that it is unreasonable and unjust that a litigant, in this Colony for the most part a person ignorant of the English language in which the Ordinance is expressed, should be deprived in this case entirely of his remedy for want of the proper cancellation of a stamp, otherwise regularly affixed at the time; and confirmed in this view by the modern enactment of the Imperial Parliament which, by section 24 [1] of the Stamp Act 1870, 33 & 34. Vict. C. 97, provides, that a promissory note, though uncanceled may be put in evidence, if it be proved at the trial that a proper adhesive stamp was affixed thereto at the proper time, I was desirous, if the language of the Ordinance would enable me to do so, so to construe the Ordinance in question as to effect this purpose; but to my regret I find that I am unable to do so, and I am on the contrary driven to the conclusion that, taking the whole of these enactments together, it is, I think, manifestly the intention of the new Ordinance that when a promissory note executed before 1882 is cancelled only by writing of the name of the maker upon it, without the date, though done at the time of execution, such note is not admissible in evidence.

The general spirit of the present Ordinance is, as would appear from the sections specified above, as hard towards the holder of a document which is, although stamped with a stamp of the proper amount at the proper time, improperly cancelled, as the previous Ordinances have been, and the only saving section, *viz.*, section 9, is powerless to aid him.

As Ordinances are now formally passed, *viz.*, as an exact counterpart of the folio copy, punctuation and capital letters are material to the meaning of the terms in which the Ordinance is expressed, and as it seems to me, the obvious grammatical construction of sub-section 3 of section 9 is clear.

To give effect to a construction favorable to the plaintiff, the words "and the instrument, &c." would have to be read as equivalent to "and every instrument, &c." as part of a new paragraph and of a new section. As it is these words would appear unmistakeably to have reference to the antecedent, *viz.*, "an instrument produced after and executed before the passing of the Ordinance" and providing in the 1st paragraph of sub-section 3 [as printed] for the due cancellation, and in the 2nd paragraph [as printed] and commencing, "and the instrument" for what shall be deemed to be its due stamping, they deal effectively with its subject-matter.

It was pressed upon me in argument, that unless this note innocently, though imperfectly cancelled by the names and not the

SIDGREAVES, date being written upon it, was receivable in evidence; the construction I have given to it would be partial and arbitrary, inas-
C. J. much as it might well be supposed that the Legislature purposed to
FORD assist, not only those who had innocently misunderstood the former
& J. J. presumably faulty Ordinance, in the case of irregular cancellation,
WOOD, by writing the date alone, but also those who had equally
1882. innocently misunderstood the law, by writing of the name alone;
PALANIAPAH but I think the Ordinance points at this strictness of construction,
CHETTY with a view to giving effect to that mode of cancellation only
v. which fixes the exact day, month and year, in which the cancellation
LIN POH. was effected.

The plaintiff appealed against this decision.

29th March, 1883.—The appeal was now heard before the Full Court of Appeal consisting of *Sidgreaves*, C. J., *Ford* and *Wood*, J. J.

Van Someren, for appellant.

Ross, for respondent.

Cur. Adv. Vult.

Ford, J. I concur in the reasons and conclusions which the Court below has given and reached in this case. I am clearly of opinion that the repeal of the Stamp Ordinance VIII. of 1873 has taken away the powers of curing the defect in cancellation given to the Court by section 30 of that Ordinance, and that fact is not affected by the circumstance of the Act having been repealed *pendente lite*, i.e., after action brought, but before evidence tendered. The cases alluded to in *Maxwell on Construction of Statutes*, p. 378, if authority were needed for what seems an obvious effect of repealing a statute—would establish these points. I should have been very glad to have seen my way under the general principle of giving a liberal and wide construction to a remedial clause, to have come to a construction of section 9, sub-section 3, of the present Ordinance II. of 1881, which would have assisted the appellant; but the language of the section seems to me, too clear to admit of any reasonable doubt, as to its meaning, which is to assist a class of instruments cancelled previously to the Ordinance by date only, and which would be well cancelled under the new Ordinance, as provided by section 1. The present section was probably, I think, framed to meet the decision of this Court in *Allen v. Meera Pullay*, which held that under the old Ordinance, an agreement stamped properly as to amount, but cancelled by writing the date only, could not be rectified—a decision involving a very great hardship to the plaintiff, but for him happily reversed by the Privy Council. The case of an instrument cancelled by name only, and not by date, does not seem to have come within the view of the framer of the present Ordinance: neither would it be clear, that had it done so, he would have extended to it the same benefit as he has done to documents cancelled with the date. The latter mode of cancellation, at least affording some greater security against the re-use of adhesive stamps, than that of cancel-

lation by name only ; whatever, however, may be the correctness, or otherwise of these conjectural reasons for the form of the present section. I am clearly of opinion that its language, and the effect to be given it, is sufficiently clear to prevent us extending it to the case of the appellants.

Sidgreaves, C. J. and *Wood, J.*, expressed their concurrence with this judgment.

SIDGREAVES,
C. J.
FORD
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1882.

PALANIAPAH
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Appeal dismissed with costs.

GUTHRIE & CO. v. SHEENA MOHAMED ABDUL KADER.

In re : ARNASHELLUM CHETTY.

A plaintiff by attaching his debtor's goods under section 422 of the Civil Procedure Ordinance 1878, acquires no title to the goods ; and if it is necessary for an equitable mortgagee of the goods to perfect his title by notice, he may do so even after the plaintiff has attached the goods, and before he seizes them in execution.

An equitable mortgage of personalty, does not however require to be perfected by notice.

SINGAPORE.

FORD, J.
1882.

August, 21.

The plaintiffs had commenced an action against the defendant, who had left the Settlement ; and had obtained an order under section 422 of the Civil Procedure Ordinance 1878, [a] attaching the property of the defendant, and had thereunder seized his share in a cargo boat or schooner. The claimant, Arnashellum Chetty, alleged that the boat had been assigned to him by the defendant, before the action was commenced, by an equitable mortgage created by a deposit of the bill of sale of the boat. On the evidence, the learned Judge was of opinion, that the deposit had been proved. It was admitted that the Sheriff had seized the boat under the writ of sequestration, [attachment] and that notice thereof had been given to the Registrar of Shipping, who consequently refused, a few days afterwards, to register the legal mortgage to the claimant of later date, which was made in pursuance of the equitable mortgage.

Donaldson, for the claimant contended, that his client was an equitable mortgagee, and that the Registrar of Shipping had no right to refuse to register the mortgage, and that the notice to the Registrar of the seizure by the Sheriff was altogether of no effect and that under the Merchant Shipping Act of 1862 [25 & 26,

[a] Section 422 as amended by Ordinance 8 of 1880, section 21, is as follows : " If it shall be shewn to the satisfaction of the Court, at any time after the issue of the writ of summons, by evidence on oath, that the plaintiff has a good cause of action, or other valid claim, against the defendant, and that the defendant is absent from the Colony, or Settlement, and that his place of abode cannot be discovered, or that service of a writ of summons cannot without great or unreasonable delay or difficulty be effected it shall be lawful for the Court, on the application of the plaintiff to order that the property of the defendant, or any part thereof, be forthwith secured, and taken into the custody of the Sheriff, as a pledge or surety to answer the just demand of the plaintiff, until the trial of such suit and judgment, and satisfaction therein. Provided always that the Court may, at any time, upon reasonable cause being shewn, and upon such terms, if any, as to security or otherwise, as may seem just, release the property seized, and order the same to be returned."

FORD, J.
1883.
—
GUTHRIE &
Co.
v.
SHERNA MO-
HAMED AB-
DUL KADER.
—
IN re ARNA-
SHELLUM
CHERRY.

Vict. c. 63, section 3,] the equitable mortgage was a valid security and did not require registration, and that priority of registration was the true test under the Act.

Buckley, for the plaintiffs contended, that the seizure having been made, and notice given to the Registrar of Shipping before the claimant tried to register his mortgage, and also before the date of the legal mortgage, and no notice having been given to the Registrar of Shipping of the equitable mortgage, the seizure had priority both in point of time, and by operation of law; and that section 43 of the Merchant Shipping Act 1854, [17 and 18, Vict. c. 104,] which provides that the Registrar shall not receive any notice of equitable claims, did not affect the question, as a similar provision was found in the Joint Stock Companies Act [X. of 1866,] and yet under certain circumstances such notice was required: although the Act provided that it could not be received; further, that if it were in the power of an equitable mortgagee to keep his claim unregistered, and set it up after others had been induced to trust his mortgagor in consequence of his apparent prosperity, the very object provided for by the Bills of Sale Act [22 of 1870],—and in a similar way by the Registration sections in the Merchant Shipping Act, 1854, would be defeated.

Cur. Adv. Vult.

On this day judgment was delivered by

Ford, J. In this case it seems to me there are two questions which are raised, and which I think the Court must deal with; although in reference to the first, it does not seem to me to be necessary for the Court to determine it, yet I think it right to express an opinion upon the point. The first question arises on the proposition which Mr. Buckley laid down, which cannot be carried, I think, so far as he would desire to carry it—the proposition being that the equitable mortgage of personalty must be completed by notice. The question is whether this proposition is not too large; and I confess it seems to me to be so, because all the cases on the point are cases in which the property or *indicia* of the property were not in the hands of the first parties, and, further than that, in most of the cases, the fact of notice being considered to be necessary, was in reference to the special claims of the Bankruptcy Court under the “Order and Disposition” clauses. The cases in question also relate to property having reference to shares in Companies and policies of insurance; I cannot find a case in which the law has gone further than that. But with regard to ships, there seems to be no decision at all on the subject; and it seems to me also, that if we come to this point, we may fairly enough draw a distinction between this case and the cases referred to. It may be said that the Registrar differs from the Registrar and Secretary of Companies, as against the owner of the shares; but in the case of the owner of a ship, he is Registrar only, and in no way represents the property, he is only the responsible officer under the Merchant Shipping Act, who is bound not to regard

notices given to him, so that even if notice be given to him by another person, he is no wiser. It is different under the Bills of Sale Act, where the register can be searched and notice can be found there. To say that in respect of all equitable mortgages of personalty you must give notice is too large a proposition; for in some cases you cannot give notice and in some other cases notices cannot be received. On that ground I am prepared to express the opinion that the proposition advanced by Mr. Buckley is too large and wide. But as to the other part of the case, it seems to me that the creditor [plaintiff] has no title at all. He is merely the sequestrator. He has got a writ of attachment, but has yet established no claim at all. He has no relationship to the position of a trustee in Bankruptcy or to the position of an assignee for value. He has no claim, except the right to have the property held, during the trial of the facts of the action. I think the holder of the equitable mortgage could perfect it, if necessary, if formal notice is required. I think, if needful, he has a perfect right to complete the title by notice before another claimant has established some right. He has still time to complete his mortgage by notice. In this case he has done that. He has given the Registrar notice afterwards; which notice the Registrar rejected; still the notice seems to me to be so far valid. This is only a claim by the sequestrator to have the property set aside, so that the owner will not run away with it; and he takes proceedings under the various clauses of the Ordinance so as to deprive him of any chance of obtaining it. Where there is a *bona fide* equitable transfer, either incomplete or completed afterwards, the title of the mortgagee must prevail.

FORD, J.
1882.

GUTHRIE &
Co.

SHEENA MO-
HAMED AB-
DUL KADER.

In re ARNA-
SHELLUM
CHETTY.

MAHOMED GHOUSE v. BOEY AH WAH.

Where a landlord receives rent in advance on the execution of a lease, and the lease simply provides that "the sum obtained in advance should be deducted hereafter," and the tenant after paying a few months' rent, declined paying any further, contending that the advance should be taken to account of rent, whereupon the landlord distrained for rent,

Held, on the wording of the lease, and the above facts, the advance was liable to be taken to account of rent at any time after the execution of the lease, although it had still some years to run; and therefore, no rent was due, and the distress should be set aside.

PENANG.

WOOD, J.
1882.

August 23.

Van Someren, on behalf of Boey Ah Wah, the tenant, obtained a rule *nisi*, calling on Mahomed Ghouse, the landlord, to shew cause why the distress warrant issued in this matter, should not, under section 14 of Ordinance XIV. of 1876, be set aside, or suspended, and the property seized thereunder, released, on the following facts. The landlord had leased four shop-houses in Penang to the above-named tenant for \$240 per annum. On the execution of the lease, a sum of \$480,—being 2 years rent in advance, was paid by the tenant to the landlord, and in respect of this sum, the lease provided as follows: "The sum of \$480 has been this day obtained in advance to the said lessor [Mahomed Ghouse] by the said

WOOD, J.
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WAH.

"lessee, [Boey Ah Wah,] to be deducted hereafter." From the date of the lease, up to a month or two of the distress warrant being issued, the tenant had paid the rent of \$20 per month, regularly to the landlord notwithstanding the advance in the landlord's hands. He declined however to pay anything further, contending the advance, was sufficient to pay any further rent for a long period then to come, and thereupon the landlord issued the distress warrant above-mentioned.

Ross, for the landlord shewed cause, and contended, that the intention of the parties was, that the \$480 was not to be deducted until the determination of the lease, which had still some years to run; or at least should not be taken to account, until the last two years of the term, which was covered by the advance; that the \$480 was to be considered as security for the due observance by the lessee of his covenants, and the lease, though inartfully worded, would be so construed as to effectuate this intention of the parties.

Van Someren for the tenant in support of the rule contended, that the words of the lease must have their natural meaning, and that the expression "to be deducted hereafter" meant, at any time hereafter, as either of the parties thought right. The tenant having now desired that the advance should be taken into account, the landlord was bound to do so, and therefore no rent was due to him, and the distress should be set aside; that nothing was said in the lease as to the advance being a security to the landlord as contended, and such a construction ought not to be given to the clause in question. He also raised other objections which are not reported, as no judgment was given on them.

Wood, J. I think it unnecessary to express an opinion on the other points raised in this case, as I am clearly of opinion that the distress should be set aside on the ground that no rent was due at the time it issued. The clause in question must receive a natural construction. Nothing is said as to the advance being by way of security, and constructing the words of the clause according to the natural meaning, the advance might be claimed as being liable to be taken to account of rent at any time after the execution of the lease. I see no obstacle in giving this meaning to the clause by reason of the words "in advance." I shall therefore discharge the distress and order the property to be released. The landlord will pay the costs of this application.

ALLAH PEECHAY v. YEAP HUP KEAT.

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Where a plaintiff brings two distinct actions of the same nature, against two defendants, which as regards his case is identical,—and for convenience sake the two actions are tried together, and both result in a verdict for him,—he is not entitled to have the costs of his witnesses; common to the two actions, wholly from one of the defendants, leaving him to his remedy against the other of them; but such costs will be apportioned between the defendants on some just principle of apportionment; and in default of finding any such principle, equally between the two. The solvency or insolvency of either of the parties, is no just principle to go by.

This was a summons taken out by the defendant, for a review of the taxation of the bill of costs in this cause. The facts giving

rise to this application being as follows: The plaintiff on one and the same day had commenced two actions of ejectment, the one against the present defendant, and the other against one Ismailah, to recover two separate portions of a piece of land belonging to him, and the whole of which he held under one title. As regarded the case for the plaintiff, his case was the same against both defendants in the two actions; he had therefore the same persons as witnesses in both cases, and the same evidence in each. This evidence was of a rather involved nature and cost the plaintiff a large sum to procure it. For convenience sake the two actions were tried together, and both resulted in a verdict for the plaintiff, with costs. It was well known, the defendant here was a man of means; whereas the said Ismailah, the defendant in the other case, was to all intents and purposes a pauper. The plaintiff in making his bills of costs, inserted all his expenses attendant on procuring the aforesaid evidence to establish his title, in the bill against each of the defendants in the two cases; and instead of the bill being taxed by the Registrar in the usual way, the Solicitors on both sides met, and taxed the bills between them; and while allowing these miscellaneous expenses amounting to \$178.20 to stand in each of the bills, as against each of the defendants, they made an endorsement therein to the effect that as these expenses were common to these two cases, the recovery of them against either of the defendants, would prevent the plaintiff receiving them from the other; and the defendant paying, was to have his remedy against the other, for one-half of such amount. These bills were taken before the acting Registrar, Mr. Kyshe, and on pointing out the above circumstances to him, and both Solicitors stating they were satisfied with this taxation, he signed the certificate for the costs so taxed, stating it to have been done by consent, and without himself going over the taxation. The plaintiff having his costs thus taxed, demanded payment of the defendant Yeap Hup Keat for the whole of these miscellaneous expenses; he objected to pay them, and took out the present summons for a review of this taxation. At the suggestion of the Court, the plaintiff waived any right he may have had, to insist that the matter was already settled between him and the defendant herein, by their respective Solicitors, and thus offered no objection to the review of the taxation by the Court. He also waived any right he may have had, to consider the matter as settled between himself and this defendant, by a promise given by this defendant, to pay the said bill so taxed as aforesaid, on a certain day. The bill was then reviewed by the Court. There were other objections to the bill which are not here reported, as not relating to any principle of taxation.

Clutton, for plaintiff contended, that the \$178.20 for the miscellaneous expenses aforesaid, being common to the two cases, were properly dealt with in the taxation, as by the indorsement the plaintiff was prevented from receiving that amount twice over, but at the same time would receive what he had fairly paid out. The defendants had nothing to complain, as whichever of them paid the amount, he had his claim over against the other

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for a half share of it, that this arrangement was fair, reasonable, and lawful, as the defendant herein was in no worse position than he would have been, had he and the other defendant been sued jointly in one action, though for distinct parcels. *Johnson v. Mills*, L. R. C. P. 22—that as there had been two actions, each if tried in the usual way, would have been tried by itself, and in that case each defendant would have had to pay the whole of the expenses attendant on such trial, [which would be the whole amount] without reference to the other action. He had, to save time, and for the sake of convenience to all parties, consented to try the two cases together; but he never intended to prejudice his right to costs, by this step; nor would the Court hold, he submitted, that such a step prejudiced his vested rights. He also referred to *Cole on Ejectment*, p. 177, and *Griffin v. Hoskins*, 1 H. & N. 95.

The defendant in person.

WOOD, J. I have considerable doubt if this mode of taxation can be considered fair, reasonable, or lawful. When miscellaneous expenses common to two distinct actions are incurred, although for convenience of both parties the actions are tried together,—such expenses should, I think, be apportioned as between the two defendants, according to some reasonable principle of apportionment, if such can be found; and if no such principle can be found, then as between the two defendants equally. These cases were distinct, the one from the other; had the case been brought against the two defendants jointly, the result might have been otherwise, [see Buller's *Nisi Prius*, p. 335]. The costs have been incurred by the plaintiff without, as I understand, any reference to the defendants or either of them; and were paid, or agreed to be paid to the various witnesses in a lump sum, for the purposes of the two actions. If the persons performing the services had been paid in respect of each separate case, the plaintiff would be entitled to recover the amounts paid them, and that would be the principle of apportionment between the two cases; but where no such precaution has been taken, and the sum charged has been paid in a lump, then the Registrar, on this one review, will apportion the costs on just principles of apportionment, and if this was not practicable, then equally between the two defendants. Such a principle as the solvency or insolvency of one or other of the parties, is certainly no just principle. I shall therefore refer the bill to the Registrar, to be dealt with on the principle I have adverted to; and as regards the other items objected to, the Registrar will help the defendant, who will inform him of the specific items he objects to, and the Registrar will deal with the whole bill on the principle of a strict bill of costs, as between party and party.

Order accordingly.

On a subsequent day, the acting Registrar having taxed the bill in the ordinary way, and the plaintiff having applied for a review of the taxation, the Court, after hearing out the matter, considered the taxation a fair one, and upheld same.

PENANG FOUNDRY CO. v. CHEAH TEK SOON.

By section 6 of Ordinance 4 of 1878, Mercantile Law generally, as it exists in England at the corresponding period, is law in this Colony, and that, whether such mercantile law is by Statute or otherwise.

Although by section 26 of Ordinance 8 of 1880, the Indian Act 14 of 1840, has ceased to be law in this Colony, by force of section 6 of the Ordinance 4 of 1878, the English Statute, 9 Geo. IV. c. 14, on which that Act was drawn, applies.

Contracts made in this Colony for goods not in *esse* at time of such contract, are within section 17 of the Statute of Frauds, by the aforesaid Statute 9 Geo. IV. c. 14.

This was an action to recover \$147 damages, for non-acceptance of a certain machine ordered by the defendant of the plaintiffs and manufactured by them at his request, and \$31.42 for work and labour done and materials provided. The defendant, among other things pleaded, that the alleged contract could not be held to be good, because he had not accepted the machine or actually received the same or any part thereof, nor did he give anything in earnest to bind the bargain or in part payment, nor did he sign any memorandum or note in writing, within the meaning of the Statute of Frauds [29 Car. II. c. 3, section 17], and of Act 14 of 1840, section 7. The facts as they appeared at the trial [from statement by plaintiffs' Counsel] were, that the defendant being anxious to have his notions of propelling a small boat by hand gear applied to a small propeller, asked the plaintiffs for their opinion, and how to apply it. He was told it would be a waste of time and money but he still persisted in his request. His ideas were put on paper and on being approved of by him, he gave plaintiffs instructions to proceed with the machine. The machine—which was of iron and brass,—was finished and tried by defendant; he thought it might be improved on, and gave a sketch of it as improved by him. The plaintiffs then made a wooden model of it which was examined by defendant and tested. He suggested further improvements which were embodied in a second wooden machine which was made. Thereafter he appeared satisfied that his idea was a mistake, and that it would be done at a waste of power.

Anthony, for plaintiffs contended that the contract need not be in writing, as the goods not being in *esse* at time of the contract, it did not come within section 17 of the Statute of Frauds, [29 Car. II. c. 3] which enacts that “no contract for the sale of any goods, “wares or merchandize for the price of £10 or upwards shall be “allowed to be good, except the buyer shall accept part of the goods “so sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note “or memorandum in writing of the said bargain be made and signed “by the parties to be charged by such contract or their agents there- “unto lawfully authorized.” The Indian Act 14 of 1840, section 7, which after setting out section 17 of the Statute of Frauds above referred to enacts, it is expedient that that section should “extend to all contracts for the sale of goods of the value of £10 “and upwards, notwithstanding the goods may be intended to be “delivered at some future time, or may not at the time of such con- “tract be actually made, procured or provided, or fit or ready for “delivery, or some act may be requisite for the making or complet-

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"ing thereof, or rendering the same fit for delivery"—but that Act had been repealed by section 26 of Ordinance 8 of 1880, whereby it is enacted that certain Indian Acts relating to mercantile law cease to be in force in the Colony on the 1st January, 1879, and among these, Act 14. of 1840. The contract also, he contended, was for work, labour and materials, not for goods, and referred to *Chitty on Contracts* [11th ed.] p.p. 365, 366.

Ross, for defendant contended the contract was for goods—a machine—and referred to *Agnew on the Statute of Frauds*, p. 188, *Clay v. Yates*, 1 H. & N. 73; *Lee v. Griffin*, 1 B. & S. 372; *Atkinson v. Bell*, 8 B. & C. 277. As regarded the Act repealed, he contended, that that particular Act, was by section 26 of the Ordinance 8 of 1880 to cease to be in force in the Colony from a certain date then past, but only because on that same day mercantile law generally, as it was then in England, was imported into this Colony by Ordinance 4 of 1878, section 6, by which it is provided "in all questions or issues, which may hereafter arise or which may have to be decided in this Colony with respect to . . . mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period if such question or issue had arisen or had to be decided in England unless in any case other provision is or shall be made by any Statute now in force in this Colony or hereafter to be enacted." The result was, that the English Act 9, Geo. IV., c. 14, from which the Indian Act 14 of 1840 was taken, was applicable here, and applied to contracts for goods not in case.

Anthony in reply contended that "mercantile law," in section 6 did not mean any Statutory enactments relating to mercantile law; that it had a limited application, and referred to a case before Mr. Justice Ford in Penang [*Shagapah Chetty v. Khoo Chye Seng & anor.*, 1880 [a] who doubted the extent and effect of section 6, but gave no opinion on it, as that case went off on another point. He again contended, the thing contracted for was not a chattel, and the cases cited were not applicable.

Wood, J. The Ordinance 8 of 1880, section 26, does not expressly repeal Act 14 of 1840, but only declares it to be no longer law. The inference to be drawn from this language favors the view of the force,—which the defendant contends,—that should be given to section 6 of the Ordinance 4 of 1878, which came into operation the same day as the Indian Act ceased to be law. In my opinion, that section applies the English Act 9, Geo. IV. c. 14, [Lord Tenterden's Act] to this Colony. On the 2nd point, I am of opinion, on the facts as stated by plaintiffs' counsel, that the work, labour and materials contracted for, was for a chattel, within the reasons of *Lee v. Griffin*. There however remains the 2nd item, the charge for the models which has to be enquired into.

The parties hereupon came to terms, and judgment was entered up, by consent, for \$10 on the 2nd item—each party paying his own costs.

Judgment accordingly.

[a] Not reported.

PATERSON v. MUNICIPAL COMMISSIONERS.

The Municipal Commissioners are bound, both by law and by the terms of the Conservancy Act 14 of 1856 as amended by Ordinance 2 of 1879, to uphold all public roads and bridges and keep them in proper repair: and in omitting to do so and allowing them to remain in a state of disrepair, they are liable to an indictment for causing a nuisance to the public, as well as to an action by any person who may sustain direct and particular damage, for such breach of duty on their part.

Where a duty is imposed by law or Statute on a person or body of persons, they do not release themselves from discharging that duty, or free themselves from liability in respect thereof, by handing it over to another to perform it,

The defendants, whose duty it was to uphold and repair public roads and bridges, gave the work on contract to a third party. One of such bridges, for want of proper repair, gave way, whereby plaintiff's horse was injured,

Held, that it was the duty of the defendants to uphold and repair the bridge, their letting the work out, did not free them from liability for the negligence of the contractor, in not properly repairing the bridge.

Action to recover \$265 for negligence. The facts of the case, and points raised therein so fully appear in the judgment, that it is unnecessary to mention them here.

Buckley, for plaintiff.

Bond, for defendants.

Cur. Adv. Vult.

On this day judgment was delivered.

Ford, J. in giving judgment, said this was an action brought by Major Paterson, the Brigade Major, against the Municipal Commissioners, for injury done to a mare of his, through their alleged culpable negligence; and to that allegation the Commissioners in their reply denied that the mare had been injured through either the negligence of them or of their servants, and they denied also the extent of the damages claimed. During the course of the trial, the defence was somewhat enlarged by the Commissioners, relying upon certain legal rights which they assumed they had, in addition to the mere denial of the fact of negligence, and they also disputed the fact of the accident having taken place at all by means of a hole in the road or bridge, which was the allegation to have been sustained by the plaintiff. The facts as alleged by the plaintiff, with which he would have occasion to deal more particularly when he went into the evidence of the case, were shortly these. On the afternoon of the 18th May, Major Paterson was driving in his carriage, with a pair of horses and two syces; and, crossing the bridge on the road which leads from Tanglin road to Alexandra road, the horses or one of the two horses fell, and seriously damaged itself by breaking its two front knees and doing some damage to one of its hind legs; and the plaintiff alleged that that fall was due to a hole which was on the left side of the bridge as you come across it, and that that hole ought not to have been there, and was there through the negligence of the Commissioners, for which reason he claimed compensation from the Commissioners. That was the subject of the cause of action. To this the Commissioners had denied both their liability at Law or by Ordinance; and they had also, as he had already stated, denied the existence of the hole, denied that there was any negligence on their part, or on the part of their servants

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for whom they were responsible, and had put the case that the bridge was duly certified by their agents or inspectors as being, and it was, in perfect good order and condition at the time of the accident. He proposed to deal first with the legal objections to the plaintiff's claim. The first objection taken by the Commissioners was, that they were not in any sense liable,—that they were not legally liable for any damages which occurred through their negligence; and it was difficult, certainly, quite to see by what contention that position could be sustained. He had looked through the various cases which had been cited, and it seemed to him to be amply clear that they were not only liable to uphold the roads and bridges, and to keep them in proper repair,—but also liable at law under the express terms of the Ordinance, which gave them the powers and responsibilities they had. The first point, it seemed to him, in this case was that regarding which the case was cited of the *Mersey Docks and Harbour Board Trustees v. William Gibbs and others*, which was brought before the House of Lords, 1 L. R. H. L. 23. That was a case in which it was laid down that “the principle on which a private person, or a company is liable for damages occasioned by the negligence of servants, applies to a corporation which has been entrusted by Statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike to tolls received by the private person, or the company, are not applicable to the use of the individual corporators, or to that of the corporation, but are devoted to the maintenance of the works, and in case of any surplus existing, the tolls themselves are to be proportionately diminished.” That case certainly seemed to deal with the question now before the Court. Although those persons received no pay, still they must be held liable for acts of negligence which they do. Then the case of the *Borough of Bathurst v. William Macpherson*, 4 L. R., App. Cases, 256, carried them a step further, and seemed to distinguish between and deal with the two grounds of claim for damages, on either of which the Commissioners would be liable, both these grounds being alleged in the present case. That was a case in which the Municipality of Bathurst, New South Wales, having, under the Act which incorporated them as a Municipality, the care, construction and management of the roads and streets within their Municipality, constructed thereunder a barrel drain which ran into an open drain, the brick work of which having broken away, and not having been repaired, a hole was caused, into which the plaintiff's horse fell, carrying the plaintiff with him, crushing the plaintiff's leg on one side, and causing a compound fracture of the leg. It was held that by reason of their construction of that drain, and their neglect to repair it [the barrel drain was not only made by the defendants, but the sole control and management of it were invested in them]—whereby as an indirect and natural consequence the dangerous hole was formed which was left open and unfenced, they caused a nuisance in the highway for which, whatever their statutory obligation may have been, they were liable to an indictment, and also to an action by the plaintiff who had sustained

direct and particular damage from their breach of duty. Major Paterson alleged not only direct and particular damage in the injury to his mare due to the neglect of the Commissioners, but also the statutory obligation of the Municipal Commissioners. It seemed to him that the Commissioners were not only bound to the plaintiff at law, but by the express Act on which their own existence was based,—the Indian Act No. 14 of 1856, as amended by the Straits Settlements Ordinance No. 2 of 1879; under either form this liability would be equally clear. The sections relating to this matter seemed to him to be framed in the clearest terms, and to meet entirely the objection of the Commissioners that they had no legal obligation. It could not reasonably be otherwise than that the Municipal Commissioners should make roads and keep them in proper repair, and that the roads, &c., should be vested in them. This was the very object of their constitution, or a very large part of the object of the formation of every Municipal body, that they should make, and when they were made, keep in proper repair, all public roads and bridges. That being their *bonâ fide* duty as a public body, or it being part of their duty, and as he had said a principal part of their duty, the Act went on as a natural thing to vest all these roads, &c., in the Municipality. Section 5 sets forth that “all public streets and roads [not being the property of the East India Company and kept under the control of the Local Government,] existing at the time of the passing of this Act, or which shall hereafterwards be made, and the pavements, stones and other materials thereof, and also for all other erections, materials, implements and other things provided for such streets and roads shall be vested in and belong to the Commissioners.” Then section 9 went on, in the most absolute form of words to impose upon the Commissioners the duty of keeping all roads and streets in a proper state of repair. The section did not seem to him to have a single ambiguous word in it. It simply was “the Commissioners shall, so far as the funds at their disposal will admit, from time to time, cause the public roads and streets to be maintained and repaired.” There was not even the word “may” used, as was sometimes the case in such provisions for Commissioners doing certain things; but “shall cause the public streets to be properly repaired and maintained,” and it went on,—“and from time to time shall cause the same to be paved, metalled, channelled, sewered or otherwise improved, and the surface thereof to be raised, lowered or altered as they may think fit; and may also make and keep in repair any footways for the use of passengers in every such street or road, and also from time to time place on the sides of such footways, or otherwise such fences and posts as may be needed for the protection of foot passengers.” The fullest power was given to them; the whole repair of everything connected with the streets, roads and bridges within the Municipality was vested in the Commissioners. But, as if to make certainty still more certain, if that were possible, they had sections 126 and 127 in the Act, the former of which defined certain rights which the Commissioners were to have in any actions brought against them, and so on. The later named section 127, gave the Commis-

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sioners "power to make compensation out of the funds applicable "to the purposes of this Act to all persons sustaining any damage "by reason of the exercise of any of the powers vested in the Commissioners, their officers or servants under and by virtue of this "Act." He was therefore quite unable to see on what the case for the defendants rested at all, the Municipal Commissioners being in his opinion a body incorporated, and under an incorporation one of the duties of which was, plainly enough, to keep in a proper state of repair all roads and bridges. He was quite satisfied that they were liable to do this, that they were bound to do it by the terms of the incorporation itself, which established Municipal Commissioners in Singapore. He now came to the second legal defences raised by the Commissioners; and it seemed to him that that was quite as erroneous, or nearly quite as erroneous, as the one in the first instance. What the Commissioners said was this:—"It may be all very true that we are liable *prima facie* for "acts of negligence, but if we choose, instead of doing the work "which we have to do, either by ourselves or our agents or servants directly, we can give it out to a contractor, and we have "done so, and we are by that relieved from all responsibility "whatsoever." He must say, as he said during the course of the hearing of the case, that this proposition was the grossest contradiction of the wisest sense, and he was glad to find that the law seemed in no way to support the contention. There was no doubt a class of cases in which persons undertaking certain kinds of work and doing it by contract, the contractor had been held liable for injuries done by his servants; and certainly there were a great number of cases on that point which it seemed to him highly impossible to reconcile with one another. But, notwithstanding, it seemed to him that there were conditions in them,—that the acts for which the contractor was held liable, and not the employer, were acts quite outside the contract itself; and that was very decidedly and clearly laid down in certain cases which to his mind would cover this. And there was a further principle which had been laid down, regarding the question whether a person or body of persons whose duty it was to do an act could release themselves of that duty by handing it over to some one else. Under the last principle, it was most clearly laid down that they could not by simply employing contractors lift from their own shoulders the consequences of neglecting a duty they were bound to perform. There were three cases to which he would refer in which this principle was very clearly and decidedly laid down. They were, *Pickard v. Smith*, 10 Com. B. N. S. 470; *Hole v. The Sittingbourne and Sheerness Railway Co.*, L. J. Ex., vol. 30, p. 81; and *Gray and wife v. Pullen and Hubble*, L. R. Q. B., vol. 34, p. 265. In the case of *Pickard v. Smith* it seemed to him that what was said there by Mr. Justice Williams was in effect applicable to this case, and affirmed directly as it had been by subsequent decisions, it was important. His Lordship went briefly into the circumstances of this case and quoted the words of Mr. Justice Williams, to which he had referred, as follows:—

"Unquestionably no one can be made liable for an act or

"breach of duty unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful work, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. That rule, however, is not applicable to cases in which the act which occasions the injury is one which the contractor was employed to do, nor by a parity of reasoning, to cases in which the contractor is entrusted with a duty incumbent upon his employer and neglects its fulfilment, whereby an injury is occasioned." "If the performance of the duty be omitted, the fact of his having entrusted it to a person who also neglected it furnishes no excuse either in good sense or law."

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These observations of Mr. Justice Williams were quoted by Mr. Justice Blackburn, in *The Mersey Dock Trustees v. Gibbs*, as stating well "the distinction between the responsibility of a person who causes something to be done which is wrongful, or fails to perform something which there was a legal obligation on him to perform, and the liability for the negligence of those who are engaged in the work."

Now, what could be more clear than that the principle applied fully in this case. There was a duty incumbent upon the Municipal Commissioners and they employed a contractor. That would not, it was here distinctly laid down, release the employer from his liability. The last proposition laid down by Mr. Justice Williams seemed to him unanswerable. Then, let us now look at the case of *Hole v. The Sittingbourne Railway Co.* That was a case in which the defendant had had the power given them and the duty thrown upon them to build a bridge across a river; and it was to be a river which by its formation should allow all vessels of a certain size to pass. The bridge was to be so built that it would open and shut, and all vessels were to be allowed to go through. The bridge was imperfectly constructed by the contractor whom the Company employed, and the Company on that ground tried to get out of their liability. Now, nothing could be clearer than the statement distinctly made in that case that such a defence would not avail. The judgments were rather long, but he would read such portions as seemed to him to bear most strictly upon this case against the Municipal Commissioners.

"Pollock [C. B.] :—If I were called upon to state the short grounds on which my opinion proceeds, to express it in the smallest compass, I would say that this case does not fall within the rule applicable to those cases where a person has been held exempt because he was not the master of the servant whose negligence or misconduct caused the mischief. But this is a case in which the maxim applies,—*qui facit per alium facit per se*; and I own my general impression is,—indeed I might almost lay it down,—that where a person is engaged on a work by contract, or by having obtained an Act of Parliament empowering him to do it, he cannot avoid the responsibility by employing somebody else to do the work under contract. In the case of *Ellis v. The Sheffield Gas Consumers' Co.*, Lord Campbell, C. J., concurring with the

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“rest of the Court in refusing the rule, says,—“ Mr. Jones argues “for a proposition positively untenable, namely, that in no case can “a man be responsible for the act of a person with whom he has “made a contract. I am clearly of opinion that if the contractor “does the thing which he is employed to do, the employer is responsible for that thing as if he had done it himself.” The learned Judge continuing, said he need hardly go on to read what the other learned members of the Court said, because they only expressed the same opinion from other standpoints. His Lordship then briefly quoted from the observations, of tenour similar to the remarks reproduced above, from Baron Martin, and afterwards the following from Baron Wilde’s deliverance :—

“As far as I can see, the real distinction is, that where the “accident happens by reason of the negligence of the servant of the “contractor so as to cause injury to a third person, that being a “matter entirely collateral to that which the contractor had contracted to do, there the liability turns on the relation of master “and servant ; but where the thing contracted to be done is the “thing which causes the mischief, and the mischief can be said to “arise without the direct authority of the person ordering because “the thing has been imperfectly done,—in other words where the “injury arises from the imperfectly doing the thing ordered to be “done, there the party giving the order becomes responsible.”

In the case now before the Court, His Lordship held that it was quite clearly the right of the Commissioners to give this work of repairing and maintaining the roads out to contract ; but if the contractor was guilty of an act of negligence in the execution of his duty, then it seemed to him, from all the cases that had been cited, to be in harmony with sound common sense and law to find them clearly liable. He next referred to the case of *Gray v. Pullen* in which the defendant, the owner of a house in the metropolis, employed the contractor to make a drain from the house to the main sewer, under the powers given by the Metropolis Local Management Act [Vic. 19 & 20 ; cap. 120.] The contractor made the drain but filled up the ground so negligently where it crossed a public footway that it subsided and left a hole into which the plaintiff fell and was injured. In this case it was held by the Exchequer Chamber, reversing the judgment of the Court of Queen’s Bench, that the defendant was liable for the injury ; that the statutable powers given by sections 77 & 110 of the Act for making the drain “also imposed on the “defendant the duty of filling up the cutting across the footway “properly and that he was not excused by reason of his having employed to perform the work a contractor who neglected to do his “duty.” The language used in the judgment in that case was very strong on the point, especially in the opinion of Chief-Justice Erle than whom probably no more powerful or learned judge ever sat in that Court. He would read shortly from Chief-Justice Erle’s judgment :—

“The appellant has contended that a duty was imposed on “the defendant, Pullen, as the owner of the premises who caused “the drain to be made across the road, to fill up the drain in a

"proper manner. Section 77, authorising the making of the drain, "implies that the duty to fill it up was also imposed, and section "110 commands that the person who makes it shall fill it up properly. And the appellant contended that the person making the "drain is responsible if the duty imposed upon him by the Statute "is not performed and damage is caused thereby, and that the complaint is of an omission to perform a duty imposed by Statute, not "of a wrongful act of commission by a contractor beyond the scope "of his employment."

The appellant relied, in that case, on the *Sittingbourne Railway* case, which they had dealt with in this case, and in the *Pickard v. Smith* case. His Lordship referred further to this judgment as a very strong one; and said it was agreed in by an exceedingly strong Bench, composed of Chief-Justice Erle, Chief Baron Pollock, Baron Bramwell, Baron Channell, Justice Byles, Justice Keating, and Baron Piggott. In concluding his remarks upon the legal objections which has been raised, his Lordship said that it seemed to him that there was no reasonable doubt as to what the law was on the subject. If, therefore, they found on the facts that the defendant had been guilty of negligence, either by themselves or their servant, contractor or agent, then they would be liable for the damage caused by that negligence.

Now he came to the facts of the case, and here the defendants had fought hard and bravely, but he thought quite unsuccessfully, as they had done all along. They took, so to speak, three lines of defence. First, they said there was no hole at all. This was going to the fact of the whole case. Brigade Major Paterson, the plaintiff, had it put to him that it must be all a mistake,—that his horse must have tripped over a stone or something of that sort, and that he [the plaintiff] must have dreamed about the affair and imagined the mare had fallen into a hole at the bridge. The two syces who saw the hole and gave evidence to that effect in the box here, were met with the humorous suggestion that they had been in the vicinity of a spirit distillery shortly before the accident, and at the time of accident the fumes had somewhat obfuscated their minds. He thought it was a very unfortunate and a very unhappy thing that the Municipal Commissioners should have instructed their learned Counsel to take that line of defence. The Municipal Commissioners were a body of men of high reputation and of high standing, and it should be their aim and study to do what was right, and not to endeavour to meet in this way an honest claim brought by a gentleman whose position certainly raised the presumption very strongly against the idea of his coming here to present a trumped-up case to the Court. There could be no doubt that there was a hole there. There was, besides the evidence of Major Paterson himself and his two syces, the evidence of the syce in the employ of Major Hales, who saw the hole before the accident; and he should have to allude by and bye to some other reasons why, he [the learned Judge] individually believed that there was a hole there on the date of the accident, as alleged for the plaintiff. The case which the defendants submitted

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to prove that there was no hole ever there, would convince no one. First, the Engineer was called, and he stated that he went to the place described as the scene of the accident, three or four days after the accident occurred, and by that time, he told them, there was no hole to be seen and no trace of any hole having been filled up. And on such a foundation as that the defendants did not hesitate to ask the Court to believe that the plaintiff, Brigade Major Paterson, made a false claim against them and then came here with a case which had no foundation in fact. That, as he had already said, was at least unfortunate. But the question still remained whether, as the Commissioners contended, it was not possible that the hole might have existed on the day in question and might have been so caused that they could not have been reasonably expected to fill it up before it was filled up, or before the accident,—in other words, that they had used all reasonable diligence and care in keeping the road in a proper state of repair. Supposing, for instance, that there had been a natural subsidence of which they could not reasonably be supposed to have previous knowledge, an unusual or extraordinary flood, or anything of that kind; an unaccustomed fall of rain might produce such a hole in the roadway; in such circumstances, it might fairly be contended, they would not be liable. But he had come to the conclusion that the hole which he believed was there on the day of the accident did not arise from any of these causes. And he had also come to the conclusion, much as it conflicted with the evidence of certainty one of the officers of the Municipal Commissioners, that the existence of the hole was due to their negligence in keeping the bridge in a proper state of repair. It was somewhat unfortunate, it seemed to him, that Major Paterson did not, at the time of the accident, make a close examination into the cause of the hole which brought it about. He acted quite naturally, perhaps, in what he did, but it might have been a wiser course to have made an examination there and then as to the cause of the hole in the roadway, rather than leaving it, as he did, until next day, when, on going to the place, he found the hole had been filled up. But they had the evidence of one of the Major's syces, who went there and examined the hole next morning. He went under the bridge and saw that the beam which is contiguous to the road, and where it abuts on the planks, forming the roadway of the bridge, was eaten up by white ants, and that it was owing to that that the earth work must have tumbled in, and so formed the hole into which Major Paterson's mare fell. His evidence was very clear and, he feared, was quite sufficient to show how the hole occurred which caused the accident. Against the evidence of the syce, there was that of the Engineer to the Commissioners, who was called for the defence. He did not deny in terms the case for the plaintiff, although before dealing with the evidence of that officer he might call attention to a report which he made at the time to the Commissioners as to the state of this bridge,—a report which, he must say, looking to the evidence of the syce and to what he himself [the learned Judge] saw with his own eyes on the two occasions he visited the bridge, seemed to him to be the most

extraordinary letter he had ever read emanating from a skilled witness. The report was as follows :—

"I inspected the bridge in question and found it to be in good traffic order. There was nothing in the state of the structure that could have contributed to the accident complained of. The bridge was repaired with a few planks on one of the abutments, and some fresh rails put in the parapets. All this was completed by the 25th April, and the bridge was then in a thoroughly sound condition. The accident occurred on the 18th instant; but as nothing had been done to the bridge between that date and the date of my inspection, or has been done since, the bridge is in precisely the same condition as it was at the time of the alleged accident. The assertion that the bridge "gave way," is a mistake. The planking and roadway of the bridge are in very good order. I cannot myself find any cause for attributing the accident to any defect in the bridge."

(Sd.) "T. CARGILL,

"M. Engineer,

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Now it did not here appear that the Engineer had examined the bridge in a way which would entitle him to make such a report as this, and in his examination in chief, he confined himself very much to stating the constituents of certain portions of the bridge; he did not give the Court any information as to the actual condition at any time of that part of the bridge regarding which he was specially questioned,—that part, namely, through the insufficiency or bad condition of which, it was alleged, the accident occurred. His Lordship quoted at some length from the evidence of Mr. Cargill, and remarked that he should have thought it would have been the duty of the Engineer to have pursued his enquiries a little further, because the whole of the bridge was not of this tampinis wood, which was not affected by white ants; he told the Court nothing as to,—he did not appear to have made any examination as to—the condition of those parts of the bridge which were not formed of tampinis; and the portion which, as was alleged gave rise to the accident was a portion not formed of this anti-white-ant wood. Quoting further from Mr. Cargill's evidence, and referring to his report to the Municipal Commissioners, His Lordship said they could not but lead any person to the impression that the bridge had been duly inspected by the Engineer, that it was thoroughly sound and in good condition, and that all persons might use it without any risk of any accident arising from any fault or weakness in its condition. There was, in his opinion, as expressed in his letters to the Municipal Commissioners and in his evidence in the hearing of this case, no reason to believe that there was anything in the bridge likely to cause any accident, and that there was no indication of any accident having occurred there through the fault of the bridge. There was next the evidence of Mr. Presgrave, another officer of the Municipal Commissioners, who went to the bridge with Major Paterson a few weeks after the accident. This witness was not a professional man, and he might fail to observe many features of or appearances about a road or bridge which would be apparent enough to a professional man. He told them that Major

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Paterson pointed out to him what he [the Major] described as a rise in the ground showing where a hole had been filled up. However, Mr. Presgrave's Municipal—he would not say what he was about to say, but simply that Mr. Presgrave did not see the signs to which Major Paterson desired to draw his attention. He now came to what he himself [the learned judge] saw there; he thought it right to visit the place and see the bridge himself, taking upon himself the right the Judge always has of exercising what is called, in the case of a Jury, the order to view. He was bound to say that nothing was more calculated to confirm the statement of and for the plaintiff, or more calculated to discredit the case put forward by or on behalf of the Commissioners, than what he found there. He was really so surprised after this first visit, on considering the whole facts over, that he was afraid his inspection must have been too hasty; the whole condition of the bridge seemed to him so bad, that he went a second time, to make sure there was no mistake. It seemed to his mind beyond doubt that the bridge had been neglected. The large beam upon which rests the last plank, that nearest the road, was simply eaten away by white ants. They had absolutely eaten away some twelve inches of the beam. It was held in its place by an iron bolt or rod of iron which should have kept it to the other beam. There was simply no wood there at all. It was gone. The planks he could not see, but he could fairly judge of their condition as a whole by the state of the end exposed. Of that, one half was entirely gone, and if one put the weight of his hand upon it, it went wagging up and down as easily as could be wished. It was simply held in the place where it was by an accumulation of earthen matter. There were also, he found, most marked indications of a hole having been filled up. He considered the whole formation of the place gave the most absolute proof that a hole of about the size of that described by Major Paterson had been filled up. The roadway consisted of laterite; but there was one solitary portion, in just such a position as that described by Major Paterson, some $1\frac{1}{2}$ foot square, formed of chopped granite. These were all indications of a hole having been filled up; and he had not the slightest doubt in saying that there had been a hole; and no doubt these men whom the contractor described as always working about the road at that time had, after the accident, seen the hole and filled it up. Of that he had not the slightest doubt. In face of what he had seen with his own eyes, he confessed he was at a loss to understand how a gentleman in the position of Engineer to the Municipal Commissioners could come into Court and give such evidence as he had done. Now, if this had all been done by white-ants, was that any excuse for the Commissioners? Most certainly not. They all knew that these pests of white-ants were one of the most ordinary causes of the destruction of wooden structures in this country; and it was the duty of the Municipal Commissioners to do as all owners or caretakers of such property in this country had to do,—to keep their eyes open for these pests. Under the whole circumstances of the case, the Law on the subject and the facts of the case being emphatically against the

defendants, the verdict would be for the plaintiff for the sum claimed, less the \$50 by which it was admitted the damage to the mare had been overestimated, at the time the suit was brought.

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Notice acquired by an agent, so as to affect his principal, need not necessarily have been acquired by the agent in the same transaction, or in course of his business for his principal; but such notice will be imputed to the principal, although acquired by the agent in a distinct transaction, and not in course of business for the principal, provided there are circumstances which satisfy the Court, that such notice was recollected by the agent, and was present to his mind at the time he subsequently acted for his principal.

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Suit to have it declared, that plaintiff, as the holder of a mortgage from one Khoo Loon, dated 21st March, 1876, was entitled to priority over certain mortgages held by the defendants, the trustees of the Roman Catholic College of Foreign Missions in Penang, dated 12th September, 1877, 23rd April, 1879, and 16th September, 1880, and to rank as 2nd mortgage next after a first mortgage held by the defendants, dated 16th November, 1875. The mortgages to the defendants from the said Khoo Loon were each and all of them effected through one Richard Jeremiah, who generally helped the defendants in investing their monies, drawing their mortgage deeds, and collecting their monthly interest. It did not appear that the said Jeremiah was paid for the said services, but always charged commission of the mortgagor, in consideration of procuring him the loan,—the further facts touching the position and standing of the said Richard Jeremiah, appear in the several judgments hereinafter given. The mortgage of 1876 by the said Khoo Loon to the plaintiff, was proved to be, as regarded date of execution, filled in by the said Richard Jeremiah, and it was contended that he, Jeremiah, had thus notice of the plaintiff's mortgage, and by reason of his effecting the subsequent mortgages for the defendants, they were effected by this notice. What further part Jeremiah took towards the execution of this mortgage to the plaintiff, appears also in the said judgments. It was also attempted to be proved, that the defendants had direct and actual notice of plaintiff's mortgage, by means of a notice served on one Francis Chebaudel, a former trustee of the said College; but this point was eventually abandoned by the plaintiff.

Thomas, for the plaintiff contended, that the said Richard Jeremiah was agent of the defendants, and his knowledge of the plaintiff's mortgage, was constructive notice to the defendants, and relied on *Brotherton v. Hatt*, 2 Vern. 574; *Fuller v. Bennett*, 2 Hare 404; *Tweedale v. Tweedale*, 23 Bevan 431.

Anthony, for defendants contended, that the said Richard Jeremiah was not such an agent, as that his knowledge should affect the defendants with constructive notice; that he was not their agent to receive notice, and the knowledge he acquired of the plaintiff's mortgage was not in course of business, while acting

SIDGREAVES, for defendants, but in a distinct and separate transaction, and referred to *Le Neve v. Le Neve*, 2 Wh. & T. 70; *Wylie v. Pollen*, 32 L. J. Ch. N. S. 728; and *Saffron, Walden Co. v. Rayner*, 14 L. R. Ch. Div. 406.

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December 4. *Sidgreaves*, C. J. Having intimated that I could not dispose of this case on the question of direct notice without the evidence of the Reverend Father Chebaudel now in Europe, I have been requested by Mr. Thomas, with a view of saving possibly the expense and delay of a commission to Europe to give a decision as to the alleged constructive notice through Mr. R. Jeremiah to the defendants of the second mortgage on the property by Khoo Loon to Khoo Kay of the 21st March, 1876.

As to the question whether Mr. R. Jeremiah had the knowledge imputed to him of this 2nd mortgage, I have no doubt whatever. It is abundantly clear that he saw that document and filled in the particulars, and the plaintiff is entitled to whatever advantages may accrue to him from that fact. There is no evidence however that he communicated his knowledge to the defendants, and the question is therefore reduced to this. When the 2nd mortgage was made by the defendants through Mr. R. Jeremiah, were they so affected by his knowledge that it became notice to them of the prior incumbrance of March, 1876? The position occupied by Mr. R. Jeremiah towards the defendants was that he "helped" them by making mortgages for them when a good opportunity occurred, and received nearly all the interest on the mortgages made at Balek Pulau including those by Khoo Loon. He received nothing from the defendants, the mortgagees, although I have very little doubt that he did receive the sums from Khoo Loon, the mortgagor, which Khoo Loon says he did. To that extent he was an agent, but to establish the case on behalf of the plaintiff it must be contended that he was employed by them as their agent to receive notice of any subsequent incumbrances. There is not the slightest evidence of any such authority,—neither was the knowledge he obtained imparted to him by way of notice to be given to the defendants, but was merely accidentally brought to his notice in a transaction in which the defendants had no part and in which Mr. R. Jeremiah was not concerned either as solicitor or agent either for the mortgagor or the mortgagees. This case stands on a totally different footing from the class of cases indicated by *Tweedale v. Tweedale*, 23 Beav. 431; and *Fuller v. Bennett*, 2 Hare, 404.

It would be a great hardship, I think, on the defendants, to bind them in September, 1877, by something that was told to Mr. R. Jeremiah [and which he was under no obligation to communicate to them, and which at present I must consider he did not communicate to them] in March, 1876. It was clearly not in the same transaction on which they had employed him, and in default of my being satisfied by further evidence of direct notice being

given to the defendants of the prior incumbrance, I must decide in their favor.

Suit dismissed.

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The plaintiff appealed against this decision, and such appeal was heard on the 29th March, 1883, before *Sidgreaves, C. J., Ford, and Wood, J. J.*

Ross, [Thomas with him] for appellants, contended, that the notice to Jeremiah, was sufficient constructive notice to the defendants, and that he was a continuing agent, and stood in the same position as a solicitor or scrivener; that the notice having been acquired by Jeremiah in a different transaction, in which the defendants had no concern, was immaterial. *Brotherton v. Hatt*, *suprà*; *Jennings v. Moore*, 2 Vern. 609; *Fuller v. Bennett*, *suprà*; *Bourso v. Savage*, 2 L. R. Eq. 134; and *Kettlewell v. Watson*, 21 L. R. Ch. Div. 685, 704; that the case of *Saffron W. Co. v. Rayner*, *suprà*, was distinguishable, as there, the mortgage was effected by a *cestui que* trust, to the defendant, and the solicitors in the case were not solicitors for the *cestui que* trust, but only for the trustee. It was sought to make out, that the notice acquired by the solicitor subsequently, of the mortgage by the *cestui que* trust, was notice to the trustees—and this it was properly held, it was not.

[The Court here asked whether, as there was no finding on the point by the Court below, the parties were willing to allow the Court as the Court of Appeal, to draw their own inference on the facts proved, as to whether, at the date Jeremiah effected the defendant's mortgages of 1877, 1879 and 1880, he had, or had not, any recollection of the plaintiff's mortgage of 1876. The parties through their respective counsel, expressed their willingness that the Court should do so.]

Ross in continuation, then contended, that on the facts, Jeremiah could not be considered as having forgotten the plaintiff's mortgage; that it was his duty to have recollected it, and must be considered as having remembered it, as it was a subject of enquiry in reference to an execution of a *fi fa*, a short while before September, 1877; that Jeremiah being a continuing agent from 1875 to 1880, transacting business for the defendants, his knowledge acquired on the 21st March, 1876, *eo instanti* affected the defendants, and they could not rely on the interval of time, so as to justify their forgetfulness of the plaintiff's mortgage on 12th September, 1877, and subsequent dates.

Van Someren, [Anthony with him] for respondents contended that in several recent cases, it had been laid down, that the doctrine of constructive notice had been carried too far. *Jones v. Smith*, 12 L. J. Ch. N. S. 381, 383, per Lyndhurst, L. C.; *Ware v. Egremont*, 4 De G. M. & G. 473, per Cranworth, L. C.; *Attorney-General v. Stevens*, 6 De G. M. & G. 148, per Cranworth, L. C.; *Montefiore v. Brown*, 4 Jurist, N. S. 1201, 1204, 1206, per Chelmsford, L. C. & Cranworth, L. C.; *Wylie v. Pollen*, 32 L. J. Ch.

SIDGREAVES, N. S. 782, 3, per Westbury L. C.; that "constructive notice," and "imputed" or "implied notice," were identical, *Espin v. Pemberton*, J.J. 28 L. J. Ch. [N. S.] 311, that this being the tendency of the Court of Chancery at the present time, this Court would not hold the notice to Jeremiah in March, 1876, to be good notice to defendant in September, 1877; that no case had gone that length, but were all cases limited to a period of time shorter than the present. *Brotherton v. Hatt*, *supra*; *Winter v. Anson*, 3 Russell 493; *Mounford v. Scott*, 3 Madd. 34, on appeal, 1 Tur. & Rus. 274, 280; *Hargreaves v. Rothwell*, 1 Keen 154; *Tylee v. Webb*, 6 Bevan 554; *Edgecombe v. Stranger*, 1 Jurist, O. S. 400; *Lloyd v. Attwood*, 3 De G. & J. 614; which were all the cases to be found on point of time, extended to an interval of 21 months at the outside, the most of them however being within the year. Here the interval of time was very much greater—the intervening time was an important consideration. 2 *Fisher on mortgages*, 603, and the reason for it was, the inconvenience and injustice that would otherwise ensue from a hard and fast rule of an agent's notice, acquired in a distinct transaction, being notice to his principals. *Lowther v. Carlton*, 2 Atkyns 241; *Warrick v. Warrick*, 3 Atkyns 291; *Worsley v. Earl of Scarborough*, *id.* 392;—Here the knowledge acquired by Jeremiah was quite accidental, not in the course of his duties as defendants' agent,—and was not likely to impress itself on his mind; and after the great interval of time that had elapsed, could not be presumed to have been on his mind; that the case of *Saffron W. Co. v. Rayner* was not distinguishable in principle from the present case, and shewed conclusively that Jeremiah [apart from the question of time,] was not an agent to receive notice, or by his notice, to affect the defendants.

Ross in reply referred to *Espin v. Pemberton*, *supra*; *Atterbury v. Wallis*, 25 L. J. Ch. N. S. 792; *Le Neve v. Le Neve*, *supra*, and *Spaight v. Cowne*, 1 H. & M. 359.

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April 3rd. *Wood, J.* In this matter as I more or less intimated, at the time of the argument, the point in issue is, to my mind, the simple question of whether Mr. R. Jeremiah had, at the time of the execution of the 3rd mortgage of the 12th September, 1877, present to his mind the existence of the 2nd mortgage of 21st March, 1876.

I attribute no material importance to the fact that R. Jeremiah was the agent of both the mortgagor and mortgagee, but I rely solely on the more general principle, that when the mortgagee in a subsequent mortgage or further charge between the same mortgagor and himself, employs an agent as scrivener to draw his securities for him who is as a fact at the time aware of an incumbency in favor of another person, the mortgagee is affected by that knowledge of his agent, always presuming that this knowledge is brought home to the agent as a matter recollected by him.

As I much prefer to use in a matter of this kind the words of an author of repute, rather than my own, I refer to 2 Dart's *Vendors and Purchasers*, Ed. 1876, p. 878, in which he says :

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"The purchaser [although an infant purchasing under the sanction of a Court of Equity] is bound by notice to his Counsel, Solicitor or Agent, or, perhaps, trustee, if acquired either in the same transaction or in a prior transaction, but under circumstances which satisfy the Court that the notice must have been recollected,"

citing for authorities in support of this latter proposition among others, the cases cited in argument before this Court, viz., *Hargreaves v. Rothwell*, 1 Keen, 154; *Fuller v. Bennett*, 2 Hare, 394; *Tylee v. Webb*, 6 Beav. 552.

And again in Sugden's *Vendors and Purchasers*, Ed. 1862. p. 757 :

"The notice to the Counsel, Attorney or Agent must be in the same transaction, but where one transaction is closely followed by and connected with another, or whether it is clear that a previous transaction was present to the mind of the Solicitor, when engaged in another transaction, the notice to the Solicitor is notice to the client,"

citing the above and many other cases. As I understand the law, although the giving of a notice to bind a solicitor, might require to be given in the same transaction, and notice so given would affect the principal with notice, whether the agent did in fact remember it or not, yet knowledge, the actual knowledge of an encumbrance present to the mind of the agent, at the time of a transaction of mortgage or purchase, in whatever transaction that knowledge may be acquired, is the knowledge of the principal—see in particular the following cases which I have adverted to as the latest authorities on the point, *Rolland v. Hart*, 6 L. R., Ch. App. 681-2 *per* Lord Hatherley :

"Then the only question is, what is actual notice? It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that which his agent has actual notice of. The purchaser of an estate has in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor.

"It cannot be left to the possibility or impossibility of the man who seeks to affect you with notice being able to prove that your solicitor did his duty in communicating to you that which, according to the terms of your employment of him, was the very thing which you employed him to ascertain.

"I think it is clear, upon the authorities, that as there was in this case, plain and distinct notice on the part of his solicitor, employed by Mr. Stagg, of the previous security, that notice must, therefore, be imputed to Mr. Stagg."

Boursot v. Savage, 2 L. R. Eq. 141-2, *per* Kindersley, V. C. :

"Supposing, however, that actual knowledge of the existence of a trust cannot be imputed to the defendant Savage, still I think he is affected by

SIDGRAVES, "constructive notice. He employed Holmer as his Solicitor in the transaction
 C. J. "of the purchase; and, according to the doctrine of equity, a pur-
 FORD } "chaser has constructive notice of that which his Solicitor in the transaction
 & } J. J. "of the purchase, knows with respect to the existence of the rights which
 WOOD } "other persons have in the property. Take the simplest case: Suppose the
 1882. "purchaser's Solicitor happens, by reason of his connection with the property,
 "to be aware that the vendor has created an equitable mortgage.
 KHOO KEE "Is it possible to contend that the purchaser would not be held to be affected
 v. "with constructive notice of the existence of such mortgage? It is
 LAIGRE & "a moot question upon what principle this doctrine rests. It has been
 ORS. "held by some that it rests on this:—that the probability is so strong that
 "the Solicitor would tell his client what he knows himself, that it amounts to
 "an irresistible presumption that he did tell him; and so you must presume
 "actual knowledge on the part of the client. I confess that my own impres-
 "sion is, that the principle on which the doctrine rests is this: that my Soli-
 "citor is *alter ego*—he is myself; I stand in precisely the same position as he
 "does in the transaction, and therefore, his knowledge is my knowledge; and
 "it would be monstrous injustice that I should have the advantage of what he
 "knows without the disadvantage. But whatever be the principle upon
 "which the doctrine rests, the doctrine itself is unquestionable."

Kettlewell v. Watson, 21 L. R. Ch. Div., 705, *per* Fry, J.:

"The first question then which arises is, did the principal know of the charge? If he did not, had he an agent who knew of the charge? Then the next question is, was it the agent's duty to communicate that fact to the principal? If it was, the Court always holds that he did communicate it, not because, in many cases, he did in fact communicate it, but because, as I understand it, it would be too dangerous to inquire whether the communication was really made, it would open the door to perjury."

Judged by this rule the question resolves itself to this, whether under the circumstances of this case, it can be inferred by the Court that Richard Jeremiah had, at the time of the third mortgage, on 12th September, 1877, knowledge and recollection of the fact of the second mortgage in March, 1876. That he had such knowledge in March, 1876, is found as a fact in the case, but that it was present to his memory in September, 1877, is another and a different matter, and I may add that I do not accept it as a fact proved in the case that he admitted his knowledge in conversation with Koon Tuck Choon in June, 1876. That he did recollect may be inferred from the fact that as an agent employed by the College to invest money for them, and presumably with a knowledge of the value of the land mortgaged, particularly with respect to lands at Balek Pulau, he might naturally be observant of the run of their affairs,—and that his assertion to the contrary may be open to question as were certain other statements which were disbelieved by the learned Chief-Justice at the trial.

On the contrary that he did not recollect may be inferred from several facts patent in the case. Richard Jeremiah, though acting as legal adviser and scrivener, was no lawyer and probably little conversant with the law of constructive notice, agency and priorities, and consequently when he had notice, as no doubt he had of the mortgage of 12th March, 1876, he regarded it as he might reasonably regard it as matter not affecting the existing rights of his employers the first mortgagees;—and only of importance, [if his foresight and knowledge extends so far], in case

of a 3rd mortgage or further charge, an event which there is no ground for supposing was at that time in contemplation by the parties,—and thus that fact of the second mortgage might not unreasonably have made, but little impression on his mind. That he did not communicate his knowledge is a fact in the case—but the more important fact unfavorable to his recollection is, that besides other business of a like kind in which he was probably engaged for others, but of which there is no direct evidence one way or another—he was employed in over two-thirds of about 100 different mortgages for the College, the incidents connected with which 60 or 70 mortgages it would be unreasonable, as I think, to expect him to remember after an interval of 18 months, the matter resting on mere remembrance unassisted by any written note or document. In the absence of a formal and regular notice given by the second to the first mortgagee, a fact which is withdrawn from our consideration, “*constructive*” or to use what may be considered the more exact word *implied* notice, can only, as I think, consistently with the authorities cited on this head, be inferred in the principal where it is beyond reasonable doubt, present in the mind of the agent, and that, I think, was not so in the case before us.

In such a case as this, hardship of some sort must of necessity accrue to one side or the other, but in arriving at the conclusion I have done, the weight of inconvenience falls as it would appear, upon the right parties. The original fault lies with the second mortgagee who is now represented by the plaintiffs, and his manifest duty was by employing a skilled practitioner, to have secured himself against any question of implied or constructive notice, by reliable proof of actual notice, which a careful practitioner would have secured to his principal by the usual precautionary measures. In my opinion the appeal should be dismissed, and the judgment of the Court below affirmed.

Ford, J. I concur generally in the views of my brother Wood in this case, as to what the law is, and think the same is clearly and tersely expressed in Sugden's *Vendors & Purchasers*, and Mr. Dart's book on *Vendors & Purchasers* as cited by my learned brother. I differ however from him and the learned Chief-Justice, on the effect of the evidence of Jeremiah's knowledge, for I think this establishes with sufficient clearness, the liability of the respondent for the knowledge of their agent. No doubt Jeremiah denies that on the execution of the third mortgage, he had any knowledge of the previous equitable mortgage to those represented by the appellant, but he also denied, although qualifying such denial with doubts,—knowledge of original notice of the mortgage when executed, his giving a slip and filling in dates, &c.

The Chief-Justice however discredited him entirely in this and some other particulars, and I must say, that I think his evidence when discredited to this extent, is to be discredited as to his memory upon a subsequent occasion and to be treated as of little or no weight in any part of the case. The question for consideration is whether from the circumstances of the case it is

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SIDGEMAN, clear.—I mean so clear that a reasonable man would entertain no serious doubt on the subject, that Jeremiah as the agent of the
 C. J. 3rd mortgage had the previous transaction in his mind. Now
 FORD & J. J. what are the facts of the case? Jeremiah, although not the sole
 WOOD 1882. agent of the respondents for investing the funds of the College was
 KHOO KEE so to the extent of investing and carrying through two-thirds
 v. of their transactions of this character amounting to some 50 or 60
 LAIGRE & mortgages, and in all cases, executed and valued the property on
 ORS. which advances were made,—drew, or settled or approved the
 mortgages drawn, and generally received the interest upon them.
 He must I think, be supposed to be, if not a continuous or general
 agent, at least one who from the nature of his numerous employ-
 ments for this special purpose, had, and must have had, his mind
 alert on the subject of these investments.

On 16th November, 1875, he had effected a mortgage between Khoo Loon and the College for 2,000 or \$2,300, and in March, 1876, had been so far given notice of a mortgage by Khoo Loon of the same property for \$5,000 to those represented by the appellants, that he declined the loan on the ground that the College had not then the money, but so far assisted the mortgage that he furnished the parties with particulars of the parcels from the title deeds and filled up the date of the mortgage itself. About 3 months after this date there is evidence and satisfactory evidence to my mind, that his memory is again recalled to the circumstances by an attempt to execute a *fi. fa.* on the property, and is said to have said when showed the writ: "It is no use to go and seize the land, " as the land is mortgaged to the College and also to Khoo Kay," and some 15 months after, that is, on 12th September, 1877, he is again negotiating a mortgage for \$1,700 between Khoo Loon and the College, acting for both parties with the very man before him, the mortgagor, in the previous mortgages. I can hardly conceive the mind of any ordinary man under such circumstances, having forgotten or having out of his memory the previous mortgage to Khoo Kay; a man to have done so, must I think have had a mind bereft almost of every and any business capacity, of which I have seen no evidence, and which would be contradicted by the trust reposed in Jeremiah by the respondents over so long a period as 50 or 60 mortgages would involve, and in so large a number of transactions. Can the mere fact of the lapse of 15 months raise a sufficient presumption of loss of memory? I confess under the circumstances of the case I think not. The agent for each party in the original mortgage, and with that of Khoo Kay further stamped in his memory, by the part he took in it, and the incident of the execution and his statement then of its existence, seem to me to render this of the highest improbability, and to negative such an assumption.

It is suggested I think, by one of my learned brothers, that Jeremiah was a man who probably knew nothing about tacking, and the need of giving notice of a second equitable mortgage, and that this ignorance may have made the subject of so little importance that he may naturally have forgotten the occurrence. Though not a trained lawyer, Jeremiah was however a clerk in

the Supreme Court Registry, where registration of Bills of Sales and other documents is common, and of a class where some knowledge of law is also common, and this might I think be almost credited with a contrary presumption. He himself however professes no such ignorance, and admits that had he a formal notice in writing when the mortgage of March, 1876, was executed, he should have communicated it to his principal, and throughout the rest of his evidence he rests his conduct on want of knowledge of the mortgage at the time of its execution, and afterwards, and not an ignorance as to the effect of a previous equitable mortgage brought to his notice.

I am unable therefore to see any substantial ground for crediting him with an ignorance which would make his memory of so strangely a forgetful class, as it would in my judgment have to have been, to have had entirely out of it in September, 1877, the mortgage of March, 1876. I should have been of the same opinion had such ignorance been evidenced rather than assumed. The contrary view would I think, give an advantage to the employment of agents with a want of knowledge of their work, and tendencies to exercise forgetfulness somewhat perplexing to follow in its results. It is to my mind I confess, sufficiently clear that this knowledge was with Jeremiah when he acted for all parties in the mortgage of September, 1877, and constituted such constructive or implied notice as must bind his principals, but my learned brothers taking a different view, the decision of the Court below will be affirmed.

Sidgreaves, C. J. I adhere substantially to the judgment delivered by me in the Court below, and concur in the judgment delivered by Mr. Justice Wood in the Court of Appeal.

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Judgment affirmed. Appeal dismissed.

April, 4. *Ross*, [*Thomas* with him] moved for leave to appeal to Her Majesty in Council.

Van Someren asked, if granted, that it might be in terms.

Per curiam—Leave to appeal will be granted on the following terms: that appellant give security in \$1,500, costs of appeal, respondents being at liberty in the meanwhile to sell the property, under their several mortgages, on giving security to appellants in the sum of \$7,000, to meet performance of any judgment or order made by Her Majesty in Privy Council.

Leave granted accordingly. [a]

[a] The appeal was never prosecuted.

MUSTAN BEE & ORS. v. SHINA TOMBY & ANOR.

PENANG. A devise of a shop as a Wakoff, which was not to be sold, but its rents to go
 — for its repairs, and the balance thereof for Kandoories for the testator's benefit, is
 SIDGREAVES, void as being in restraint of alienation, and tending to a perpetuity.
 C. J. Such a clause, though void from the moment the Will takes effect, is still not
 1882. beyond the right of the next-of-kin to call in question; though for several years
 — they may have acquiesced in it, and make no claim to have same set aside, for
 December 6. more than 12 years from the time the Will first operated.

The trustees of the shop, for the purpose of Wakoff and Kandoories, do not
 cease to be trustees, merely because such devise is void: they hold it as trustees
 for that purpose until the devise is held void, and thereafter, in trust for the next-
 of-kin. The case falls within section 2 of the Limitation Act XIV. of 1859, and is
 not barred by limitation.

This was a suit by the plaintiffs, as legatees under the Will
 of one Ibramsah deceased, to have certain clauses and trusts of
 the Will declared void, and to have the good and valid trusts, and
 legacies, carried into effect. The Will was dated 13th November,
 1863—the testator died in January, 1864: probate to his Will
 was granted to the defendants in February, 1864. By this Will,
 the testator appointed the defendants his executors; and among
 other things declared, that a certain shop, being No. 13, Market
 Street, in Penang, “should not be sold by any one, but its rents
 “should go for its repairs, and the balance should be spent for
 “Kandoories for the testator.” These Kandoories were feasts
 given to the friends of the deceased, and the poor generally,
 during which feasts, alms were given, and sometimes prayers
 recited: they were considered to benefit the testator's soul. The
 defendants administered the estate; and with the consent of the
 next-of-kin, among whom were the plaintiffs, and at their request,
 kept the said shop as directed, and applied the rents as desired
 by the Will. The plaintiffs were now desirous of having this
 clause of the Will declared void, and the property declared undis-
 posed of, and so go to themselves as the next-of-kin, or to
 them by the terms of the Will. The defendants resisted this,
 considering they were bound to uphold the testator's Will, and
 pleaded the Statute of Limitation, among other defences. The
 defendants, on 6th May, 1881, filed an account shewing they held
 the shop as Wakoff, as directed by the Will. The defendants had
 a deed of trust, of the shop, drawn up, carrying out the wishes of
 the testator. There were other points and matters also raised in
 the suit, which are not reported, as they were settled between the
 parties subsequently, or otherwise went off, and were undecided.

Ross, for plaintiffs contended, that the devise of the shop was
 void as being in restraint of alienation, and the Kandoories as
 tending to a perpetuity, and cited *Fatimah v. Logan*, [a] and
Hassan Noordin v. Shaik Eusoff decided by Ford, J. [b] as in point.
 He admitted that whatever money had been expended by the
 defendants for the purpose of carrying out the testator's wishes,
 and with the assent of the plaintiffs, could not form a matter of
 account.

Van Someren for defendants admitted the devise and gift for
 Kandoories were, on the authorities, void; but he contended that

[a] ante page 255.

[b] Not reported.

the clause if void, was void at the moment the Will became operative, which was in January or February, 1864. The plaintiffs should have sued them to have the same declared void—or at least within 12 years thereafter. The object of the plaintiffs, in having the clause declared void, was, in order to get the property for themselves; and that they could get only in one of two ways—either by having the clause declared void; and the property to fall into the residue, and for which they were legatees, and so obtain it as a legacy under the Will—or as being property undisposed of, in which case they would take it as next-of-kin, as in case of intestacy. But if they took it as a legacy, they were barred after 12 years, by sub-section 12, of clause 1, of the Limitation Act XIV. of 1859,—and if as in case of intestacy, by six years, under sub-section 16, as there was no clause applicable to the case. In either case, they were barred. The only way it would be attempted to get over the difficulty was, by relying on section 2 of the Act, and contending there was a trust, and so limitation was not applicable: but there was no trust here for the plaintiffs. The only trust there was, was for a particular purpose—for the Kandoories for the testator's own benefit. This trust if void, falls to the ground, and there was no other trust in the case. An implied trust would probably be relied on, but section 2 must be construed to be applicable, like the home Act, only to express trusts, Ordinance IV. of 1878, section 2, clause 2.

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Ross in reply. Limitation does not apply, as the defendants were trustees of the property. The trust is express with regard to the property, and the defendants are trustees of it under the Will. Once holding as trustees, they cannot, when the trust is declared void, turn round and say they do not hold it on trust. They hold it on trust however void, until the moment it is declared void and then in trust for us. The object of the trust may be altered, by the devise being held void; but still, a trust it was, and so it remains. It must be held to be an express trust, though now, for the benefit of the plaintiffs. An implied trust however is sufficient under section 2, see *Thompson on Limitation*, p. p. 233-237, and that, in equity, there clearly was here. The defendants also have signed an acknowledgment, which revived our claim, if barred, by the account they filed on 6th May, 1882.

Sidgreaves, C. J. held that the clause was void, but the defendants were nevertheless clothed with a trust, and the case fell within section 2 of the Limitation Act, and consequently the plaintiffs' claim was not barred. He also ordered that the trust deed executed by defendants, in respect of the shop, should be given up to be cancelled, and the property conveyed by them, by a new deed, to the plaintiffs. Costs of all parties to come out of the estate.

**MAHOMED MUSTAN & ANOR. v. KANA SHAIK
IBRAHIM.**

PERANG.
—
SIDGREAVES,
C. J.
1882.
—
December 7.

The plaintiffs having contracted with one A, to purchase certain lands from him, thereafter agreed with the defendant to sell the same to him, at a large profit. Lands in that neighbourhood were then rising every day in value, by reason of certain Government Notifications, and were required for immediate purposes of building, to supply the wants occasioned by the said Notifications. A, hearing the plaintiffs had sold the land at so large a profit, refused, of his own wrong, to complete the contract he had made with them, and in consequence was sued by the plaintiffs for specific performance of his contract. While this action was pending, the plaintiffs and defendant executed an agreement, which, after reciting that the plaintiffs had purchased the lands of A, and had agreed to sell it to the defendant, the said A. refused to carry out his contract, proceeded as follows:—"We have instituted an action against him in the Court, after demanding from him the said lands. If we succeed in getting judgment in the case, and the lands decided in our favour, we shall immediately make the bill of sale in your [defendant's] favour, or in favour of those whom you will appoint. If we do not succeed in getting the lands in the suit, we will return to you the said sum of \$200. which we took from you as an advance." The plaintiffs' case against the said A. was a long while, [owing to the block of cases on the trial list,] pending, before it was heard—it eventually came off, and A. was decreed specifically to perform his contract with the plaintiffs. The defendant hearing the plaintiffs had succeeded, called on them to fulfil their contract with him, but owing to the said A. having appealed against the decree, they were unable to do so. The defendant then repudiated all further connection with the land, and claimed that his contract was at an end, and requested a re-payment of his advance. The plaintiffs refused to admit this, and so matters remained, until the appeal, which took some nine months before it was heard, and the judgment against A, in the Court below, affirmed. A. thereafter specifically performed his contract with the plaintiffs, and the plaintiffs called on the defendant to complete his contract with them. At that time the value of the land had considerably gone down, and was no longer of much use to the defendant, as sufficient lands had been utilized for the purposes of the Government Notifications. The object for which the defendant had purchased it had wholly failed. The plaintiffs then sued the defendant for specific performance of his contract.

Held, by the Court below, that the defendant was justified in his refusal to take the lands, as "judgment in the case" meant, judgment of the Court below, in which the suit was pending at the time of the agreement: that plaintiffs being unable then, by reason of A's appeal, to perform their contract, the defendant was discharged from his.

Held, on appeal [by *Ford and Wood, J. J., Sidgreaves, C. J.* dissenting,] reversing the judgment of the Court below, that "judgment in the case" meant final judgment, whenever, and at whatever Court it might be—and the defendant having so contracted, was bound to take the land. Decree for specific performance by him accordingly.

This was a suit for the specific performance by the defendant of his contract with the plaintiffs, for purchase of certain lands. The plaintiffs had contracted with one Hajee Pakir Saiboo for the purchase of his lands, and thereafter agreed with the defendant for the sale of such lands to him. In consequence of certain Government Notifications, lands in the neighbourhood of the lands in question, had risen considerably in value—and the object of the defendant in purchasing it was speculation, to sell it again to some person intending to utilize it for the purposes of the Notifications, or himself to so utilize it. The said Hajee Pakir Saiboo hearing the plaintiffs had contracted to sell the land at a large profit, refused to complete his contract with them. They thereupon, on the 3rd December, 1880, sued him in the Supreme Court here, for specific performance—this suit was a considerable time pending before it could be heard, owing to the block of cases on the trial list. Pending this suit, and shortly after it had been

commenced, the plaintiffs and defendant executed an agreement in Tamil, which, being translated, was as follows:—

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“Penang, 9th June, 1881. Prior to this, on the 19th October, 1880, we [plaintiffs] settled and purchased two belongs of land [describing it] from Hajee Pakir Saiboo for \$2,500, and the said Hajee Pakir Saiboo has delivered to us an agreement for that amount, which said lands we have sold to you [defendant] for \$3,900, and received from you \$200 in advance. The said Hajee Pakir Saiboo having failed to carry out the terms of his agreement as aforesaid, we have instituted an action against him in the Court, after demanding from him the said lands. If we succeed in getting judgment in the case, and the lands decided in our favour, we shall immediately make the Bill of Sale in your favour, or in favour of those whom you will appoint, and receive the balance of \$3,700. The costs of stamp and Bill of Sale shall be yours. If we do not succeed in getting the lands in the suit, we will return to you the said sum of \$200, which we took from you as advance. The heirs and executors of the two of us shall carry out the terms of this agreement.”

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The plaintiffs proceeded with their suit, which came on for hearing on the 27th July, 1881, when a decree was made, that the said Hajee Pakir Saiboo, specifically perform his contract. The defendant hearing that plaintiffs had succeeded, called on them to complete their contract with him, and was told to wait a day or two. The defendant, at the end of two days, went again to the plaintiffs and demanded performance of their contract with him, when the plaintiffs informed him that the said Hajee Pakir Saiboo on the 5th August, 1881, had obtained leave to appeal from the decree made against him, and hence they could not then fulfil their contract with him [defendant.] The defendant then repudiated all further connection with the plaintiffs, and the contract—and claimed that the same was at an end, and also claimed his advance of \$200. The plaintiffs refused to acknowledge this repudiation or claim of the defendant. Nothing further was done, except that the said Hajee Pakir Saiboo prosecuted his appeal, but the same did not come on for hearing and judgment, till 2nd May, 1882. The result of the appeal being that it was dismissed, and the decree for specific performance, affirmed. Hajee Pakir Saiboo, thereupon specifically performed his contract with the plaintiffs: and the plaintiffs being then in a position to give the defendant a title, called on him to fulfil his contract. The defendant declined to do so, maintaining that the same had been put at an end by him as aforesaid, that the land had considerably gone down in value, and was of no use to him, or for the purposes for which he purchased it. The plaintiffs then [12th June, 1882] sued him for specific performance of his contract, and this suit now came on to be heard before His Honor the Chief-Justice. Other points were also raised and argued, which are not reported, as no judgment was given on them.

Ross, for plaintiff. The judgment mentioned in the agreement must be taken, not to mean judgment of the Court below, but of the Court of Appeal as well. The parties knew that an appeal was possible, and there was no reason to suppose they did not mean to take it in. In this contract, time was not of the essence of it, and a decree for specific performance should go.

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Van Someren, for defendant. Time was clearly of the essence of the contract—the fluctuating value of the property, and the state of the market at the time, made it so. The parties knew why they wanted the land, and that it was necessary that as little time, as possible, should be lost, in order to get it. The contract speaks of a suit having been instituted in “the Court”—that Court of course was this, the Supreme Court—it was not the Court of Appeal that the action was then pending in, and then goes on to say, “If we succeed in getting judgment in the case”—surely this means, the case then instituted and pending in this Court—then “immediately” after, they are to make the conveyance. If judgment meant more than the judgment of the Court below why limit it to the judgment of the Court of Appeal—it might also mean the judgment of Her Majesty in Privy Council, which it would be absurd to suppose the parties would have contemplated, when they were desirous of having the land as soon as possible.

Ross, in reply.

Sidgreaves, C. J., after remarking that the parties evidently were not of the same mind as to the meaning of the words they had used, and on that ground alone it would have been unjust to hold the contract binding and decree for specific performance—adverted to the terms of the contract. His Lordship remarked, that the suit was spoken of as having been instituted in the Court—and “Court” under the Civil Procedure Ordinance V. of 1878, section 6, meant “a Court or Judge”—but was distinguishable from “Court of Appeal” which was also defined. The nature of the property, the state of the market and the object for which the purchase was made, all required time to be of the essence of the contract. Could he suppose the parties, being thus desirous of getting the land as soon as possible, intended to wait the decision of the Court of Appeal, which sat but once a year here, and the time of its sittings indefinite. If they meant by “judgment,” the judgment of the Court of Appeal; there was nothing to limit it to that; as counsel had remarked, it might be said to be the judgment of the Privy Council—but the parties never could, and did not he felt certain, contemplate that stage of an appeal. On the whole, he had come to the conclusion, that “judgment in the case” was, the judgment of the Court of first instance, and as the plaintiffs were then unable on their own shewing to complete, their purchase, they could not now, compel the defendant to fulfil it, when he had no longer an object, or the wish to perform it.

Judgment for defendant.

The plaintiffs appealed against this judgment, and the appeal was on the 31st March 1883, heard by the full Court of Appeal, consisting of *Sidgreaves*, C. J., *Ford & Wood*, J. J.

Ross for appellants. The question here is, what was the meaning of the word “judgment” in the contract—it must mean final judgment, whenever that judgment might be pronounced. [He was then stopped by the Court, who called on]

Van Someren for respondent—"judgment" must mean judgment of the Court below—the contract speaks of the Court in which the case is pending, and then speaks of the "judgment in the case." The further clause, "If we do not succeed in getting the lands in the suit," also shews they intended to confine it to the particular original suit. They were also to convey the land "immediately" after judgment. The "suit," "case," or "action," terminated with the judgment of the Court below. The appeal is not a part of the "action," "suit" or "case." The word "Court" is used, which is distinguishable from "Court of Appeal"—and if the word judgment meant more than the judgment of the Court below, there was no reason for saying it should not apply to the judgment of the Privy Council. The nature of the property, its fluctuating value, and the surrounding circumstances, shew the judgment of the Court below was the one, and only one, intended. If judgment meant more, the parties were not *ad idem*, and no specific performance can be decreed.

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April 3. *Wood, J.* was of opinion that the judgment should be reversed, as judgment meant final judgment, in whatever Court such judgment might be pronounced—and the context "getting judgment in the case, and the lands decided in our favour, we shall immediately, &c.," shewed the parties meant a judgment which would have the effect of giving the plaintiffs' possession of the land, and a right to deal with it as theirs. The judgment of the Court below gave them that, but was appealed against, and so they were deprived of their right. The judgment of the Court of Appeal, again gave it them; and that judgment not having been appealed against, was the final judgment.

Ford, J. was of the same opinion, and remarked that the defendant, if he meant only the judgment of the Court below, could have said so. He enters into speculation, to buy what would be the result of a certain action, and he had himself to blame, if it afterwards turned out unprofitable. He had agreed to take the land after plaintiffs got judgment for it, and in his opinion, that judgment meant, final judgment—the judgment which placed the plaintiffs, in a position to give him, what he purchased. There was no evidence, he remarked, that the parties were not *ad idem*.

Sidgreaves, C. J. dissented from this judgment, and reiterated his opinion as expressed in the Court below—his learned brothers however holding otherwise, the judgment of the Court below would be reversed, and a decree for specific performance made.

Judgment reversed.

CHIN GUAN TAK & ORS. v. CHIN SEAH POW.

PENANG.

WOOD, J.
1883.

February 7.

On reference of the accounts in a partnership suit, to the Registrar for enquiry and report, it is incumbent on him, on such materials as are before him, and to the best of his ability, to find definitely on the several items in the account and to make up an account shewing how the partners stand in respect to each other.

Finality in such report is essential.

Where therefore the partnership books were lost and each party brought in his account made up from memory, but the Registrar being dissatisfied with the evidence and accounts of both parties, in his report—stated, he could make nothing of the accounts, and recommended the plaintiffs should be non-suited. On exceptions to such report, the Court allowed the exceptions, and referred the accounts back to the Registrar for a definite and final report, but ordered the costs of the exceptions to be costs in the cause.

Exceptions to Report of Deputy-Registrar. This was a suit for partnership accounts, and had been referred to the Registrar for enquiry and report. At the enquiry it appeared, that the books of the partnership were not forthcoming. The plaintiffs alleging they were being kept back by the defendant, and he in return alleging that they had been accidentally destroyed by fire, when the partnership place of business was destroyed. The destruction of the place of business by fire was admitted by the plaintiffs. The Deputy-Registrar was satisfied that the books had been burnt as stated by the defendant. It also appeared that the books not being forthcoming, the plaintiffs and defendant had each prepared an account from memory, which accounts agreed but in two or three particulars—in every other respect they greatly differed from each other—each party swore to the correctness of his accounts and to the respective items thereof, and called witnesses to prove his own account. The Deputy-Registrar was dissatisfied with both accounts and the evidence of either side, and in his report, after stating these facts, recommended that under the circumstances, the plaintiffs should be non-suited; and inasmuch as they had come into Court, and had the defendant arrested on an order of arrest, and detained here for several months, knowing, from the outset, they could not establish their case,—that such non-suit should be with costs. The plaintiffs excepted to this report, and these exceptions now came on for hearing.

Ross for plaintiffs contended, that the Deputy-Registrar was bound—on the materials such as then were before him, and the demeanour of the witnesses and with the exercise of his own common sense—to find definitely on the accounts, to the best of his ability:—he should have found severally on the heads usually mentioned in an ordinary decree for partnership accounts—that finality in his report was altogether absent, though it was essential, so as to make an end of the litigation. He referred to 1. *Lindley on Partnership*, [2nd ed.] 85, 1000; 2 *Daniel's Ch. Prac.* [5th ed.] 1216-17; *Winter v. Innes*, 4 M. & Cr. 101-3; *Lee v. Willock*, 6 Ves. Jun. 605; *Fenner v. Agutter*, 1 M. & K., 120; *Paynter v. Houston*, 3 Mer. 297, 302; *Walmesley v. Walmesley*, 3 J. & L., p. 556; *Grieg v. Hogan*, 20 Beav. 219. The recommendation as to costs was irregular and could not be upheld. *Daniel's Ch. Prac.* 1264-1268.

Anthony, for the defendant contended, that it was impossible for the Deputy-Registrar to make anything of the accounts—the case was altogether an exceptional one, the books being destroyed and the accounts made from memory, so that the reasons and principles laid down in the cases cited, were inapplicable. The report was sufficiently final under the circumstances—it finds that nothing can be made of the accounts.

Wood, J. considered the report defective on the points pointed out by *Mr. Ross*, and referred the same back to the Deputy Registrar to find definitely the state of the accounts between the parties, to the best of his judgment and ability, on consideration of the whole of the evidence, as bearing on all the items in the two accounts.

Ross asked for the costs of the exceptions as against the defendant. He referred to *Winter v. Innes*, *suprà*, p. 115.

Anthony submitted that the case was, on that point, in his favor: it would not be just to visit the defendant with costs of an application which was occasioned solely by the Deputy-Registrar's mistake.

Wood, J. considered that under the circumstances the costs of this application should be costs in the cause.

Exceptions allowed. Costs, costs in the cause.

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It is proper, for the purposes of appealing, that the certificate of the fixing of a rate, should shew, on its face, the date it was made—but such date is not absolutely necessary under section 10 of the Act XXV. of 1856, and its absence does not invalidate the rate. Neither does the absence of authentication, by two Commissioners, of such rate, or any amendment thereof,—under section 10 aforesaid, invalidate it.

On an appeal, by a rate-payer, against a rate fixed by the Commissioners, the onus is on the Commissioners to prove, both the rate and the reasonableness thereof, and it is for them to do so, before the appellant is called on to prove the unreasonableness thereof.

Managers, Engineers and others of an estate, are not “laborers” within section 23 of the Act XXV. of 1856, so as to entitle their dwellings to be exempted from rating, the section moreover, is merely permissive, and not directory, on the Commissioners.

In estimating “the gross annual value” under the Act XXV. of 1856, of an estate, carried on by the owners thereof, the Commissioners are entitled to estimate its annual value as an estate in the hands of a suppositious tenant of reasonable knowledge and skill.

Dicta, as to estimating the annual value of houses in the town, for purposes of assessment.

This was an appeal by the appellant, the manager and part owner of Batu Kawan Estate, against the assessment fixed by the Commissioners under Act XXV. of 1856, on Batu Kawan Estate, for the year 1882. The assessment as originally shewn in the books of the Commissioners, was, on objection taken to them by the appellant under sections 9 and 10 of the Act, amended in amount. This was in the previous year, 1881. This year, 1882, they simply adopted their amended assessment of 1882. These amendments were neither authenticated with the signatures of two Commissioners, nor had the certificate on its face, the date of

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such amendment. They opened no new book of assessments for 1882, and the notice they gave, although more than 15 days from the date of its being drawn, was less than 15 days from the date it made its appearance in the *Penang Gazette* and *Government Gazette*.

Van Someren, for appellant contended, that the rate was bad as 15 days public notice, under section 9, had not been given, nor new books opened under section 12; the rate was also bad as there was no date to the certificate in the book which contains the assessments and valuation—but to be valid the rate must be certified as of a particular day; it must be dated, and bear the date on the face of it, sections 10, 12 and 18: the rate was also bad as not authenticated by the signatures of two, or even one, Commissioner, section 10,—nor re-authenticated under section 12.

D. *Logan* [*Solicitor-General*] contended, that the want of notice was waived by the appearance of appellant on the day named in the notice, to object to the rate—the want of a date on the certificate and of authentication by the Commissioners, were matters of form which did not invalidate the rate. The notice sent to the appellant, fixes the date. He also objected, that no grounds of objection were mentioned in the summons of appeal.

Van Someren contended that no grounds need be stated, and referred to *Archbold's Practice of Quarter Sessions*, 279.

[*Wood, J.* I am of opinion that under section 10, the certificate of the rate, does not require to have expressed, on its face, the date of its being made, though it is proper that it should be so, for purposes of appeal. Sections 8, 10 and 18 must be read together; but whereas here the date can be fixed from the notice sent to the appellant of the fixing of such rate, the object intended to be gained by the date appearing on the certificate, is gained. As regards the objection as to the absence of authentication, I am of opinion that in such an assessment as this, the Municipality obviously intended to, and might legally, levy the full amount of 10 per cent. on buildings and 5 per cent. on lands: inaccuracies as to the authentication of amendments, do not vitiate the proceedings—they are inaccuracies which do not affect the rights of the appellant in this case at all—and in the absence of authorities, I cannot see that they invalidate the rate.]

The Secretary of the Commissioners, was then called by the Solicitor-General, who simply proved the rate had been made: whereupon,

Logan contended, that as he had shewn the rate to exist, it was not incumbent on him to shew that it was not unreasonable—it might be taken *primâ facie* that it was reasonable, inasmuch as it was made with the assistance of a valuer, and by the Commissioners themselves, who were local men, as directed by the Act, that the way in which the rate was arrived was immaterial, if it was correct; and it would be impolitic and unreasonable to disclose the *modus operandi*; that the appellant should shew by positive evidence, that the Commissioners were wrong, and when it is shewn, *primâ facie*, that they were wrong, that then only they should be called on to justify their assessment.

Van Someren contended, the onus was on the Commissioners to prove not only the rate, but the reasonableness thereof, and cited *Regina v. Topham*, 12 East 546; *Regina v. Hull Dock Co.*, 3 B. & C. 516, per Abbott, C. J. at page 525: also *Arch. Quarter Sessions*, p.p. 332-3.

Logan in reply.

[*Wood, J.* I think, upon the authority of the cases cited, it lies upon the Commissioners to shew the reasonableness of the valuation,—before the appellant can be called upon to prove it to be otherwise.]

Evidence was then taken on behalf of the Commissioners, and of the appellant, and the Court addressed by the respective Counsel, on the evidence, generally.

Cur. Adv. Vult.

March 27. *Wood, J.* This was an appeal by Mr. J. M. Vermont, Manager and part-owner of the Batu Kawan Sugar Estate in Province Wellesley, against the assessment fixed by Municipal Commissioners of Penang on the houses, buildings and land belonging to that estate.

By Act No. 27 of 1856, section 21—"An annual rate not exceeding 10 *per centum* of the annual value shall be imposed upon all houses and buildings, and not exceeding 5 *per centum* upon all lands within each station [of which Penang or Prince of Wales' Island with Province Wellesley is one], and shall be payable by the owners thereof by half yearly instalments. The rate shall be fixed from time to time by the Governor of the Settlement."

Such rate has been in fact fixed at 10 *per centum* for houses and buildings and 5 *per centum* for lands.

By section 22, certain houses, buildings and lands are excepted from rating by the Act but the provisions of the section affecting this modification are not material to this case.

By section 23, the Commissioners may exempt from taxation any house or hut which shall be occupied rent free by any laborers employed at a plantation.

The manner of assessment of the rates upon houses, buildings and lands in the Settlement is by Act XXV. of 1856, section 4, declared to be as follow:—"The estimated *gross annual rent* at which the houses, buildings and lands liable to the rate *might reasonably be expected to let from year to year* shall for the purposes of the rate be held and deemed to be the *annual value* of such houses, buildings and lands. The value of a house or building so estimated shall not include the *value* of any machinery contained thereon."

As to this provision it is to be remarked that it is nearly identical in some of its terms with that of 5 & 6, Wm. IV., c. 96, section 1, except that instead of *gross rent*, the English Act enacts that the rate shall be "upon an estimate of the *net annual value* of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year," and no mention is made of any machinery.

By Ordinance No. 2 of 1879, section 2, it is enacted that "At the end of section 4 of the Indian Act No. 25 of 1856, the follow-

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"ing words shall be added, that is to say 'but in estimating the
" 'annual value of any land on which machinery is employed for
" 'manufacturing the produce of such land, it shall be lawful to
" 'take into consideration the enhanced value given to such land
" 'by the presence of such machinery.' "

Thus, as I read the several enactments, the Commissioners have in the case of such a property as that of Batu Kawan Estate, the duty of fixing a rate upon an estimate :

1. As to the land, of the gross annual rent at which it might reasonably be expected to let from year to year, taking into consideration the enhanced value given to such land by the presence of the existing machinery employed for manufacturing the produce of the land which is on the estate, and

2. As to the houses and buildings, upon an estimate of the gross annual rent at which they might reasonably be expected to let from year to year exclusive of machinery.

Acting on the powers thus given, the Municipal Commissioners of Penang have assessed Batu Kawan Estate for the year 1881 at :

For the lands.....	\$10,260.93
For houses and buildings.....	\$ 2,400.00

Total...\$12,660.93

Against this assessment Mr. Vermont has appealed under section 17 of Act 25 of 1856 to the Supreme Court of the Colony, and apart from preliminary questions already disposed of at the trial, the only point raised before me on which I have taken time to consider my judgment, is whether the amount of this assessment is excessive.

The objection that such a property as the Batu Kawan Estate, is one in which occupation and ownership invariably go together, and that in the strict language of the Act, the property in question could not "reasonably be expected to let" at all, is entitled to little weight. It is notorious that many properties are similarly situated and authorities which need not be specifically referred to settle this point.

Possibly exception might be made to the principle that the gross annual value is to be ascertained by reference to the *existing occupier* as suggested by the author in *Castle's Law of Rating*, p. 364, for this might let in some question of the special ability and superior qualifications of the existing occupier. But there can be little doubt that a reasonable construction of the Act would be that the rate should be founded on an estimate of the gross rent at which the houses, buildings and lands might reasonably be expected to let from year to year in the lands of a tenant of reasonable knowledge and skill on the supposition that such a tenant is ready and willing to take it.

Taking this therefore as the reasonable construction of the Act, it is obvious that in the case of the Batu Kawan Estate there are in fact two properties, 1 the Sugar Estate proper, and 2 jungle land as yet unreclaimed but capable of reclamation and improvement,

The Sugar Estate consists of :

1. The land with its machinery, plant and appliances,
2. The houses and buildings attached to the Sugar Estate.

The question before me being whether the rate is reasonable in amount, it is matter of little moment to consider the exact mode in which the Commissioners have arrived at their results, if the Court is satisfied that by applying just principles of rating the result is reasonable.

With respect to Batu Kawan looked at as a Sugar Estate, taking the facts and figures supplied by Mr. Vermont, it consists so far as lands are concerned of some 1,333 acres of land usually in course of cultivation, 753 usually in fallow, 195 roads and canals, and 30 or so, devoted to buildings and their curtille-
ges.

It has machinery, and buildings efficient for dealing with the produce of 1333 acres of sugar, well protected from the encroachments of the sea by expensive embankments, and a reservoir and pipes for the supply, though not always continuous in dry seasons, of fresh water to the estate. Mr. Vermont, the present appellant, has been its manager for 32 years and it may reasonably be taken that in his hands allowing for what he considers only the moderate goodness of the soil for the production of sugar, all has been done for it that care and skill could effect to make it a sugar estate complete and effective in all necessary points. As a *practical result*, the estate in gross return yielded last year 30 piculs an orlong or something like 30,000 piculs for the 1333 acres usually in cultivation. Against this is put the costs of cultivation and the costs of manufacture and the result has been a net income for the last 6 years but one of \$35,000, that is to say from the gross income of the sale of 30,000 piculs of sugar with some small quantity of rum, after deducting all costs of cultivation, manufacture, the replacement of machinery, the upkeep of roads, canals, embankments and works and the interest on money borrowed, the very large income of \$35,000 has been made. Last year from some large expenditure in machinery the income was \$21,000, but the result in the 6 preceding years is an average amount yearly of the sum above named.

In dealing with such a property as a sugar estate consisting of houses, buildings and lands with the machinery and works belonging to it, it is obvious that the plain way of treating it would be in analogy with other properties of a similar kind in England by estimating the gross annual rent of *the whole concern*—buildings, houses, and land—but the language of the provisions of the Acts and Ordinances under which the Municipal Commissioners of this Settlement act, is different from that under which property is rated in England, and we see that referring to the powers given to the Commissioners they have two separate duties thrown upon them. As to the land, of estimating its gross annual rental taken by itself with the enhanced value given by the presence of the machinery but without the houses and buildings on it, and as to the *houses and buildings* of estimating their gross annual rental without the land or machinery.

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It might, as it seems to me, have been contended with some weight of reasoning that the whole sugar estate being one concern, lands, houses and buildings united, all combining for the purposes of the growth and manufacture of the products of the sugar cane, one portion being useless without the other, that it is but reasonable that the sugar estate should be so rated that the gross annual rent of the houses and buildings without the machinery, and of the lands taken with the enhanced value given to them by the presence of the machinery should, taken together, be equal to and the same as, the gross annual rent of the whole concern. Thus such is the intention of the Acts and Ordinance taken together—and that all that the enactments require is, that the Commissioners should distribute this whole annual rent fairly between the two portions of the estate, land on the one hand, and houses and buildings on the other, for the purpose of levying 5 per cent. on the land, and 10 per cent. on the houses and buildings. This view of the case was not however urged upon me in argument, nor have the Commissioners in fact acted on this principle. They have assessed the cultivated land, at \$7.50 per orlong per year, the fallow land at \$2.50, and the buildings at a valuation of \$200 per month—the result being in their judgment fully justified as to the land by the large annual returns of the estate, and as the houses and buildings by taking the percentage which money when invested in building is expected to pay to the investor, as well as the rent usually paid elsewhere by tenant to landlord, for buildings of somewhat similar kind.

That the Commissioners in rating the land at the figures they have done, have not rated beyond what is reasonable, I think is abundantly clear. The value of the Sugar Estate so far as land is concerned is hardly to be measured by the exact number of orlongs cultivated and fallow. The estate is made what it is by the expenditure of large sums of money in reclamation, in devoting a large breadth of land, here 195 acres, roads and canals, and some 30 acres to buildings, and the land convenient for their use, to erecting embankments, sluice gates and water supply, and it may be, many other smaller matters which are indispensable to the efficiency of the concern. No doubt this large sum of money [Mr. Vermont says \$300,000] was expended with a view to large returns, with a view to the formation of a Sugar Estate, the revenue from which would show a profitable employment of capital. It might have happened that this money might have been unprofitably spent, and the result be most unsatisfactory, but the contrary is the case. Mr. Vermont calculates that on the capital spent in the concern the return is now 10 per cent., that it may be not unfairly valued at that sum of \$300,000, and it appears that a sale of three-fourth of the estate was lately effected for what Mr. Vermont estimates at \$200,000, of course including the buildings. Under such circumstances an estimated rent for the land which is based upon the fact of there being some 1,500 orlongs of sugar producing land cultivated and fallow, and regarding them as ordinary outlying lands without reference to the roads, canals, embankments and works generally, which have made these lands

so productive as to yield in skilful hands 30 piculs an acre, or even 25, is a mode of dealing with the subject matter of the rate very highly beneficial to the person rated. There can in fact be no doubt of the value of the property taken as a whole. Mr. Vermont admits the net income to be \$31,000, all expenses paid, a sum which does not represent trade profits, but the sum which the owners obtain as net-profit by employing their machinery and plant to reduce into marketable commodities the produce of the land,—and for the privilege of farming this property, so far as *lands* are concerned, lands with the enhanced value given to them by the “presence of machinery,” the Commissioners estimate the rent, from year to year, to be paid by a supposed tenant, at something like \$9,000 or including jungle lands \$10,263.93, a sum which I cannot consider unreasonable.

As to the *houses and buildings*. The estimate arrived at by the Commissioners is \$2,400 per year or \$200 per month. As to the value of these buildings or the cost of erecting them new, there is some contradiction in the evidence adduced. Mr. Vermont estimates his own house at the cost of its original building \$4,000, the Engineer’s house at \$700, and the buildings for the machinery, shops, &c., at \$8,000.

Mr. Dunlop, Engineer to the Penang Sugar Estate, estimates the buildings if new, at from \$25,000 to \$30,000, and states that a new machinery, house was lately erected at Byram Estate, including foundations for machinery, for \$14,000. No other reliable evidence was given as to the actual value of the buildings and houses if new.

The Commissioners have valued the houses and buildings at \$200 a month, as Mr. Presgrave has stated, at so much in respect of each house or building, arriving at an estimate of \$200 or thereabouts, and, inasmuch as the rent is to be *gross rent*, upon the supposition that the houses are in good repair and kept so by the landlord, in this particular differing but little from houses newly erected, and he justifies this estimate by the rent which a landlord would expect as a fair return for money expended in houses and buildings, and thus taking the houses and buildings if new or nearly so, as being worth \$30,000, a very high estimate of their value, at 8 per cent., a very low estimate as to interest, he gives the value at \$2,400. There may be some difficulty in fairly estimating the value of the houses and buildings if new or in thorough repair without machinery. But taking the value at something like a medium between the two valuations of Mr. Dunlop and Mr. Vermont, or at \$20,000, and the interest of money employed in building at 12 per cent. which is 3 per cent. in advance of what is the ordinary interest for money as given by our Courts, the sum of \$2,400 is in fact arrived at, which I cannot consider unreasonable.

As it seems to me this method of arriving at the value of the houses to the tenant is the most advantageous to the tenant that could be suggested,—the houses and buildings which it is admitted in this case are what are suitable and necessary *must* be had by a tenant renting the land, and they could hardly be provided for

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him at any less rate than what a capitalist would consider the ordinary return for money invested in houses and buildings.

The remaining property upon which a rate has been made, the jungle land is, although part of the Batu Kawan Estate, no part, properly speaking, of the Sugar Estate, but is kept for various reasons. It is available for reclamation. Mr. Vermont considers it valuable as securing a better rainfall, but he says it yields nothing by way of actual revenue. Like the Sugar Estate itself it is scarcely reasonable to suppose that any one would take it in whole or in part at a yearly tenancy at all. A long lease would have to be granted in order to enable the tenant to get back the cost of reducing it, from the condition of wild land, to land of a productive character. That it has a selling value is certain. Mr. Vermont says \$15 an orlong, Mr. Morrison values the jungle on Byram Estate at \$30, jungle land probably of a superior character to that at Batu Kawan, and there is evidence also that land usually sells for something like 10 to 12 years' purchase. Reversing this process it seems to follow that if the land is worth \$15 to sell, its value taken yearly is presumably at least one-twelfth of that amount or much over the 70 cents at which the jungle land is rated. It seems to me that if the jungle land is rateable at all at anything but an almost nominal rate, it must be rateable at a sum of something like one-twelfth of its selling value. That it is not rateable at all was not argued before me with any show of force. There is notoriously abundance of waste land in the Settlement not yielding profit for the moment, but capable of improvements so as to be productive. All these waste lands have been rated by the Commissioners for years on the principle doubtless that although not productive at the time, and practically incapable of being let from year to year, they are still assessable at a rate proportionate to their selling value, and a decision at variance with this view would seriously unsettle a well-established practice.

As this judgment may probably be considered subject to reconsideration before a superior tribunal on matter of law, it is necessary that I should distinguish between matter of law and matter of fact, and I accordingly find as facts:

1. That the houses and buildings on Batu Kawan Estate are not unreasonably rated at \$2,400 gross annual rent.
2. That the lands on Batu Kawan Estate including jungle are in the aggregate not unreasonably rated at \$10. 260, 93 gross annual rent, making even a very large allowance for the acknowledged great care and skill of the present manager and part owner, Mr. Vermont.

Though results at which I have arrived are so to say, matters of fact, yet matters of law so underlie them that they may be said to be the foundations on which this finding of fact is based, and as matter of principle I hold that, as regards such an estate as this, in estimating "the gross annual value at which the houses and buildings might reasonably be expected to let from year to year," the Commissioners are entitled to estimate their annual value as part of a sugar estate in the hands of a supposititious

tenant of reasonable knowledge and skill. Always as in this case presuming that the buildings are suitable for the purpose. In towns or places where house-rent is high, from the increased value of the land on which the buildings stand, this rent might be estimated with reference to similar buildings in such localities, in good tenantable condition; but where there is no such element of advanced value, the gross annual rent is well estimated at the rate per cent which a landlord may reasonably expect for capital invested in buildings, the obligation resting on the landlord of keeping the houses and buildings in good tenantable repair.

In rating the land of the sugar estate with the enhanced value given to it by the presence of machinery, I am far from saying that the Commissioners are wrong in estimating the rent at so much per orlong for cultivated and so much per orlong for fallow land. Such a mode of estimating land may be useful and practical in many ways, but in applying the language of the enactments, I think they are entitled to treat the sugar lands as a whole, and to estimate the gross rent at the rent which a tenant would give for the entire sugar estate, with the privilege and power of using the machinery for the manufacture of the produce of the land less of course the rent for houses and buildings which are estimated apart. With respect to the jungle lands I consider the point of whether being unprofitable or nearly so, but being capable of improvement they are rateable at anything but an almost nominal rate, as a point which has not been fairly raised or argued before me, and one which if it had been raised and exhaustively discussed is not necessary to the decision to which I have arrived, that the lands on the entire estate, including jungle, are fairly rated at \$ 10,260.93, and the houses and buildings at \$ 2,400.

The only other point which remains and which was adverted to by Mr. Vermont, but not seriously advanced by his Counsel, is the meaning of the word "laborers" in section 23 of Act 27 of 1856, which enacts that "the Commissioners may exempt from taxation any house or hut which shall be occupied rent free by any laborers employed at a plantation." Mr. Vermont contended that the houses occupied by the Manager, Engineer and others who are in one sense of the word "laborers" are properly exempt from taxation, supposing the language of the Act to be directory on the Commissioners so to exempt—but the word "laborers" must be construed in its ordinary sense, which I think there can be no doubt refers only to the coolies, or working hands on the estate, making their living by manual toil, and whose "lines" or quarters have been exempted from taxation by the Commissioners, and I entertain some doubt, whether this provision of the Act is not permissive, as in terms it is, and not unreasonably intended to confer a liberty on the Commissioners to deal liberally with occupiers and owners in extreme cases.

The appeal will therefore be dismissed with costs.

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PENANG. A an aged Chinese woman, in 1925, made a document in China, in her own language, by which she declared that for the peace of her family, she made a distribution of her property between her four sons, and therein referred to her interests in certain property in Penang, which she reserved for "her daily expense." The sons were no parties to the document, but respectively acquiesced in the same.

Wood, J. The title deeds of this Penang property were in the name of one of these sons, and appeared to be his absolutely. From the date of the aforesaid document, and for a period of about fifty years thereafter, the rents of this Penang property were remitted to China, and distributed by the then eldest member of the family, among the said four sons or their descendants.

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In 1864, certain descendants of these four sons made a further document, by which, after referring to the previous document made by their "ancestor," and with the view of offering an inducement to the members of the family to study, the rents of these Penang houses were divided into certain proportions. The plaintiff was a party to this latter document, but the defendant was not.

In 1890, the defendant, the administrator of the son in whose name the title deeds to this Penang property were, claimed the property as his exclusively, and refused to recognize the aforesaid dealings and disposal of the same, whereupon the plaintiff, an adopted son of one of the four sons, and interested by name in the original document of 1825, brought this suit to have the aforesaid Penang property declared to be A's and the document of 1825, a good and valid family arrangement and binding on the defendant.

Held, that the document was a valid family arrangement, and binding on the defendant.

Held also, that although the document of 1864 was not made by the defendant, or otherwise binding on him, it was properly admitted in evidence, as shewing the state of things in the family at that time, in connection with this property.

Suit to have it declared that certain lands and premises in Beach Street, Penang, belonged to one Shea Shee, deceased, and was the subject matter of a family arrangement made by her and her four sons: to have the said family arrangement declared valid, as such, and to have the trusts thereof carried out. The plaintiff was an adopted son of the fourth of the said four sons of the said deceased: the defendant was the eldest surviving son of the first of the said four sons. The eldest of those four sons of the said Shea Shee, Koh Cheng by name, had purchased the said lands and premises in 1817 and 1820 respectively, and had the conveyances thereof made in his own name. In 1825, the said Shea Shee, in China, executed a document written in Chinese, which being translated, was as follows:—

"Mother Shea Shee's testament. Thinking that we should like to see the members of the same family always in peace, and that examples of filial piety and amity are nevertheless scarcely met with, and as I have four sons whose names are Cheang, Boo, Cheng and See, and as the partage of my small property is not yet fixed, although I am more than seventy years old, and am aware that I have not long more to live, therefore to prevent any dispute about the same, and to provide that my sons and grandsons remain for ever in good harmony, I will before my death, share between them my properties,—“ but as See, my fourth son died some time ago leaving my daughter-in-law Noan Shee, a widow, I feel uneasiness of heart on account of his son Heem. In consequence, calling for the elders and most impartial members of the family, it has been justly decided that [here followed a reservation of three pieces of land in China, the first for the said mother Shea Shee, “for her daily expenses during her remainder days,” the second for her eldest son Cheang “as his primogeniture right,” the third for the daughter-in-law, Noan Shee, “to help her to bring up her son.”] The document then proceeded as follows: “The rest divided in four equal parts will allow you four “brothers to exert yourselves and make trade. Do not say afterwards that

"I left you too small properties, or that I have been partial. To prevent you forgetting how I divided my property amongst you, I will that four copies be made of the partage and that each of you receive and keep one. The following members of the family are witnesses:

TAN SOK,
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mark of Shea Shee.

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"Testament of mother Shea Shee, made the 21st day of 9th moon, in the 6th year of the Emperor Tan Kwang's reign [1825].
"Written by Heng Chun, of the same family."

To this document, were attached four schedules giving each of the four sons specifically certain lands, but *all* these lands were situate in China. Besides these schedules, was an endorsement on the original document which, omitting unnecessary parts, proceeded as follows: "Mother Shea Shee's reserved share for her subsistence until her death [certain other lands in China] and the interest in five shops and houses in Penang island, Hon Tia "Keem." This endorsement was not signed by either Shea Shee or the witnesses. Saving this allusion, no mention was made in the whole testament or document, to these Penang lands and premises. The whole document was admitted in evidence and marked A. No probate had been taken to it.

The four sons never executed this document, but there was some evidence that they were present at the time it was made. The rents of these lands and premises were proved to have been remitted regularly to Shea Shee during her lifetime, even before, as well as after the making of the aforesaid document; and after her death, were remitted to the eldest member of the family then present, and by him divided amongst the four sons or their descendants, until shortly before the commencement of this action, though in varying proportions. Shea Shee died in 1827. In 1864, certain of the descendants of the four sons,—among whom was one Khoo Joo Chye, the eldest son of the eldest of the four sons before mentioned,—made and executed an agreement, which while offering an inducement to the members of the family to study, and to the obtaining of certain literary degrees, apportioned these rents in a manner somewhat different from that which had theretofore been the practice. This document, among other things, stated that it was made in order to "perpetuate our ancestor's recommendation, who had long since possessed in "Penang, Beach Street, near the market, five houses and shops; "and in the 6th year of the Emperor Tan Kwang's reign, they "enjoined us to assemble the four members of the family with "some arbitrators selected amongst the elders of our clan, and "to partake these five houses and shops in equal lots." This agreement divided these rents into three shares, one share of which was to be divided equally amongst the descendants of the four branches, and the remaining two shares to be given to those of the family who obtained the literary degree of Sin Sae, or Chinese B. A.

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At this time, the eldest son Khoo Cheang was dead, and his son, the said Khoo Joo Chye had not obtained administration of his estate. The defendant was no party to this document : it was admitted in evidence by the Court, and marked C. There were other documents marked B, D, etc., which are not here set out, as being irrelevant to the present report. The defendant, after the death of Khoo Joo Chye, his elder brother, applied for and obtained administration to Khoo Cheang's [the eldest of the original four sons] estate, and claiming these lands and houses as his father's, to the exclusion of the other members of the family received the proceeds of the sale of the lands and premises [which had been previously sold by an administrator *durante absentia*], and applied the same exclusively for the next-of-kin of the said Khoo Cheang, deceased.

The plaintiff, claiming to have an interest therein, under the aforesaid documents, his alleged right was denied by the defendant, and hence this action. The case was heard by the Court on previous days, *vis* ; 12th, 14th, 19th October, 1880 ; 9th May, 1881 ; 16th April, 21st June, 5th September, 14th, 15th, 17th, 24th November, 1882 ; 11th January, 13th and 14th February, 1883—and came on for final argument, this day.

Ross for the defendant, contended *1st*, the property was not Shea Shee's but Khoo Cheang's, *2nd*, If Shea Shee's property, still the alleged family arrangement was not one the Court would uphold, for want of mutuality and consideration, *3rd*, document C. was inadmissible as not having been made by defendant, or by any person who could have bound him ; Joo Chye not then being administrator of Khoo Cheang's estate, *4th*, document A was not a Will, and had not been admitted to probate ; but *5th*, if a Will or Deed, or document of any kind, it only provided for a life estate for Shea Shee in these Penang houses, and there was an intestacy, or no disposition of the property—after her death ; and Khoo Cheang as her heir [she dying before the Act XX. of 1837] took these houses as such, to the exclusion of the other sons ; *6th*, if there had been any acquiescence on his part to this arrangement or the dividing of the rents, it was in ignorance of his rights, as heir.

Thomas for plaintiff, was not called on.

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19th February, 1883. WOOD, J. In this case I have been asked to defer the judgment which I was prepared to give on the conclusion of the argument and summing by the defendant's Counsel, without calling on the plaintiff's Counsel for his general reply, in order to give more distinct and considered utterance to the form of my judgment with a view to its ultimate consideration by the Court of Appeal.

I find as matter of fact that not only was the Deed A. executed by the original owner Shea Shee,—but that the property had been dealt with from time to time since its execution for a period of nearly 50 years in conformity with, as I understand, the custom and law of China, and on the assumption of its efficiency. I further

find as a fact that there is not only no evidence of the fact of the purchase of the 5 houses in question by Khoo Cheang, but that since the time of the settlement [A], he and his descendants have never in any way attempted to establish their now alleged right, except shortly before the commencement of this suit. As matter of mixed law and fact, I find that it may reasonably be inferred that the five Penang houses were purchased by Cheang with monies of Shea Shee. Her statement of this fact being in fact the root of title so far as evidence can at this lapse of time be got to support it.

As matter of law, I am of opinion that taking only the literal translation of the two Protectors of Chinese, Messrs. Karl and Pickering, without their deductions or inferences in relation to Deed A, and as matter of construction, the effect of the Deed A, is, that the four sons of Shea Shee should enjoy the five town lots in Penang in equal shares after her decease, in conformity with the specific intention expressed in such document that she desired so to divide her property generally among her children, though providing for them by special donations to each to take effect at once.

I also find as matter of law that the family having acted on such a distribution for a period of nearly 50 years in accordance with Chinese Law and custom, the Courts of this Colony are unable to recognise the present claim of the defendant, even supposing it to be based on a right construction of the Deed by the law of this Colony, inasmuch as such claim is barred by lapse of time.

Let there be an inquiry before the Registrar, as to who of the parties to this suit are now by law entitled to the proceeds of the land in question—bearing in mind that the decision in the case, has as yet, only established the validity of the Deed A, and its construction as a declaration of the trusts of the Penang houses in favor of the children of Shea Shee, as against the claim set up by defendant, for exclusive possession of the same as representative of his father the alleged owner and the heir-at-law of Shea Shee, and has not dealt with the rights of the four sons of Shea Shee *inter se*, such last matter to be subject to the further consideration of the Court should questions arise upon that head.

Costs up to the time of decree to be paid out of the estate.

The defendant appealed against this decision.

26th February, 1885. The appeal was now heard before the full Court of Appeal, consisting of *Sidgreaves*, C. J., *Ford* and *Wood*, J. J.

Ross [*Van Someren* with him] for appellant. Document C. was not admissible, as defendant was no party to it. It did not bind him, nor the estate of Khoo Cheang. It was no evidence as against him, or the estate he now represents, and should not have

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SIDGREAVES, been admitted. Document A., is not a valid family arrangement.
C. J. There must always be consideration for such an arrangement,
FORD } **J. J.** before it is upheld. *Williams v. Williams*, 2 L. R. Ch., Ap. 294.
& }
WOOD } On the construction of the document A., the mother has no more
 1883. than a life estate in these lands and premises, and if the document
 — be taken as a Will, there was an intestacy as to them after her
KHOO JOO death, and if it be taken as a deed or document of any kind, there
HEEN is also no disposal of them, after that event. *Kho Cheang*, as
 v. her heir, succeeded to them, as being before the Act XX. of 1837.
KHOO JOO If he acquiesced in the doings of the family, it was without con-
LAM. sideration, *Williams v. Williams*, *supra*, and in ignorance of his
 private rights as heir. *Cooper v. Phipps*, 2 L. R. E. & I., App. 149;
Deacham v. Thynne, 6. *Ibid*, 223.

Thomas for respondent was not called on.

Sidgreaves, C. J. We are all of opinion that the document C. was admissible, not as binding the defendant, but for the purposes it was admitted in the Court below, *vis.*, to shew the condition of things as at the date of it. As regards the question of the family arrangement, I am of opinion it is not void on the grounds raised by the Appellant and should be upheld. It has been acted on or otherwise acquiesced in by all the members of the family for the past fifty years. It was made for the peace and order of the family, and for that reason should not now be disturbed. In *Story's Equity Jurisprudence*, § 132, we read, "there are cases of family compromises, where, upon principles of policy, for the honor or peace of families, the doctrine sustaining compromises has been carried further. And it has been truly remarked, that in such family arrangements, the Court of Chancery has administered an equity, which is not applied to agreements generally. Such compromises, fairly and reasonably made, to save the honor of a family, as in case of suspected illegitimacy, to prevent family disputes and family forfeitures, are upheld with a strong hand; and are binding, when in cases between mere strangers the like agreements would not be enforced." That passage appears to me to be strictly applicable here. I therefore think this appeal should be dismissed.

Ford, J. I do not say I feel no doubt upon the decision of the Court below, but such doubt is not strong enough to lead me to interfere with its decision. I can quite conceive the reasons given for giving effect to this agreement, between the various members of the family, acted on as it has been, with the exception of certain modifications in 1864,—for nearly 50 years. My doubt is as to its legal effect. The rest of the Court however, approving of the decision of the Court, below, I can only say, that if that decision is to be reversed, it must be by a higher tribunal.

Wood, J. I see no reason to alter my previous decision. This agreement has been made for the peace of the family and will be upheld by Courts of Equity. *Story Eq. Jur.* § 132.

Appeal dismissed—Costs out of the Estate.

3rd March, 1885. Leave to appeal to Her Majesty in Privy Council, granted on terms.

PAH JUSOH v. MEH KEECHEE & ANOR.

The plaintiff claiming to be one Pah Jusoh, commenced proceedings in the Ecclesiastical Court, seeking the revocation of Letters of Administration granted to the defendant, Meh Keechee, to the estate of Pah Jusoh, deceased, on the grounds that Pah Jusoh was himself, and was alive : the object of the application was, to obtain possession of certain title deeds of Pah Jusoh in the defendants' hands, and to establish his title, as "Pah Jusoh," to the lands therein comprised. The plaintiff, when the matter was ripe for hearing, abandoned these proceedings, and commenced an action, on the Civil side, in ejectment, to recover possession of such lands from the defendants : he based his title to these lands, firstly as being Pah Jusoh the person mentioned in the title deeds, and secondly as having been in long and uninterrupted possession thereof. He did not pay the defendant, her costs in his abandoned Ecclesiastical proceedings, and the defendants now applied for a stay of proceedings in this action, until such costs were paid.

Held, that this action was more comprehensive in its nature, and included some matters not included in the Ecclesiastical proceedings. The two proceedings were therefore not substantially for the same causes of action, and a stay of proceedings was refused.

This was a motion by defendants for a stay of proceedings in this action of ejectment. It appeared from the affidavits filed on behalf of the defendants, that the plaintiff, with the view of getting possession of the title deeds of the lands the subject of this ejectment, and to establish his title to such lands, had commenced proceedings on the Ecclesiastical side of this Court, to have the Letters of Administration granted to the defendant Meh Keechee, to the estate of Pah Jusoh, deceased, revoked, on the grounds that he was Pah Jusoh and was still alive ; that when the ecclesiastical proceedings were ripe for hearing, the plaintiff had abandoned same, and his motion had been dismissed with costs, but which costs he had omitted to pay ; that without paying such costs, he had commenced this action of ejectment to establish his title to, and recover possession of, the same lands ; that his real name was Jusoh and he had added on the title Pah [father] as a prefix only, in order to make out his claim, and it was believed that these proceedings were vexatious. The affidavit filed for the plaintiff, shewed he claimed title to these lands, first as being the Pah Jusoh mentioned in the title deeds, and secondly, as having been in long and uninterrupted possession of the lands for more than 12 years : he denied the proceedings were vexatious.

Van Someren for defendants, now moved for a stay of the proceedings herein, on the ground that the costs of the former proceeding had not been paid. He contended that the proceedings were substantially for the same causes of action—the identity of the plaintiff with Pah Jusoh, being the question in both. He referred to 2 Arch. Q. B. Prac. 856 ; and *Tichborne v. Mostyn*, 8 L. R. C. P. 29.

H. C. *Vaughan*, contra.

Wood, J. I am of opinion that these two proceedings are not substantially for the same causes of action. Although the action of ejectment might cover the ground of the proceeding in the Ecclesiastical Court, it nevertheless includes other points and other matters, as stated in the affidavit of Mr. Vaughan, the plaintiff's Solicitor. I do not think there is any substantial ground for holding that the plaintiff is guilty of vexatious or

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CHEE & ANOR. oppressive conduct in merely bringing this second action, after he abandoned his first case : his object in so doing, probably being its insufficiency to take in his whole case, and his bringing this ejectment was only a mode of trying more comprehensive causes of action. The motion will be dismissed ; each party paying his own costs thereof.

Motion dismissed. [a]

KYSHE v. INCHE NAP PENDEK & ORS.

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February 21. *Semble.* An administrator will be allowed to sue in *formá pauperis*, on an affidavit that there are no funds belonging to the estate wherewith to carry on a suit. The words "in his own right," in section 459 of the Civil Procedure Ordinance of 1878, does not deprive him of this right.

Action in ejectment, in *formá pauperis*, by plaintiff, acting Registrar of the Court, and Administrator *de bonis non* with the Will annexed of Syed Sheriff Tunku Syed Hussein, deceased. The plaintiff had made an affidavit that he had no funds, and in fact there were no funds, wherewith to commence and carry on the suit, and that one Sheriffa Zoharra, the principal person interested in the Estate, who was pressing the claim, was a pauper, and had been so treated by the Court for years, in connexion with certain Sulus monies. On this affidavit he had obtained leave to sue in *formá pauperis*, Counsel having certified he had a good cause of action.

Thomas for defendants, now moved to set aside the order granting leave to sue in *formá pauperis*. He contended, that an Administrator would not be allowed to do so, and referred to section 459 of the Civil Procedure Ordinance V. of 1878, and *Paradise v. Sheppard*, 1 Deck. 136 ; *Oldfield v. Cobbett*, 3 Bevan, 432 ; and *Parkinson v. Chambers*, 24 L. J. Ch. N. S. 47 ; that the plaintiff was an administrator with an interest, and ought to be liable for costs. *Parkinson v. Chambers, supra.*

Van Someren, for the plaintiff contended, an administrator had this right at common law, and the cases cited, being in Chancery, were inapplicable. The facts also of those cases did not appear to have been set out on affidavits. A pauper plaintiff, was not bound to be a suitor "in his own right." *Bryant v. Wagner*, 7 Dowl. 676 ; 2 Arch. Prac. 1070, [*Ed.* 13,] and section 459 of the Ordinance referred to, did not interfere with this right. He further asserted, as matter of fact, that he could verify by affidavit, that not only the person [Sheriffa Zoharra] who pressed the litigation, but all persons beneficially interested in the estate, were paupers within the meaning of the section of the Ordinance.

[a] The ejectment subsequently came on to be tried before the same learned Judge when the plaintiff did not insist on his identity, but relied solely on his long possession. A verdict was given against him. J. W. N. K.

Thomas denied this statement, and stated he was prepared to meet it by counter-affidavits.

Wood, J. I incline to the opinion that this question must be decided as to the real litigants, and that if it can be shewn that the real litigants, the persons beneficially interested and who press this suit, are paupers, it would be unjust to disallow the plaintiff as appointee of the Court and their mere representative, to sue on their behalf, he having no one on whom to rely to pay the costs incurred by him. The plaintiff as Administrator, it is true, is entitled to 5 per cent. commission on the proceeds of the Estate, but I do not think that, that of itself gives him an interest in the litigation within the ruling in *Parkinson v. Chambers*. I shall therefore allow this application to stand over to admit of the filing of further affidavits on behalf of the plaintiff, and any counter-affidavits, should the defendants be disposed to contest the statements of the former.

Order accordingly. [a]

CARGILL v. CARMICHAEL & ANOR.

Comments upon proceedings in a Court of Justice, though reflecting on the character and evidence of a witness examined therein, are privileged, if made in a fair spirit of discussion, and not recklessly, and without regard for truth.

The plaintiff had been examined as a witness in a certain proceeding in Court, and gave evidence which was, not only at variance with the sworn testimony given by other witnesses, but difficult for one to accept as correct. The Judge who tried the case, in delivering judgment therein, adopting the facts as spoken to by such other witnesses, commented in somewhat strong terms on the conduct and evidence of the plaintiff, but not so as to irresistibly lead one to the conclusion that the plaintiff had deliberately perjured himself. The defendants in a public journal, in referring to the case, deliberately charged the plaintiff with having "lied" on that occasion, and on being sued for libel, justified [without attempting to prove the truth of the assertion.] that the article complained of was no more than a fair comment on the proceedings in Court.

Held, it could not be so considered, and was in excess of the right of free and fair comment. [b]

Action for libel. The pleadings and facts of the case so fully appear in the judgment, that they need no further mention here.

Bond, for plaintiff.

Harwood, [Acting Attorney-General] for defendants.

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On this day judgment was delivered by

Sidgreaves, C. J. This was an action for libel, and the facts out of which the action arose are fully set out in the statement of claim, as follows:—

1. The plaintiff is a member of the Institute of Engineers and past President of the Society of Engineers, London, and was at the time herein-

[a] Further affidavits were filed by plaintiff, but defendants filed no counter-affidavits and never renewed the application. The case proceeded in *forma pauperis* and is reported on the merits, *infra*. [July and August, 1883.]

[b] See *Paterson v. Municipal Commissioners*, 28th September, 1882, ante p. 561.

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SINGAPORE.

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SIDGRAVES, after mentioned and still is in the employ of the Municipal Commissioners of Singapore, and the defendant James Carmichael, is the Editor, and the defendant John Francis Hansen is the proprietor or printer and publisher of a newspaper called *The Straits Intelligence*.
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2. In the issue of that newspaper bearing date the 4th October, 1882, the defendants falsely and maliciously printed and published of the plaintiff the words following:—

"Tampering with the Truth."

"Some time about the beginning of our era, Pilate asked despairingly, 'What is truth?' and he remained unanswered. If the Roman Governor had heard the assertion of Brigade-Major Paterson and the evidence of Mr. T. Cargill, Municipal Engineer, in the case decided by Mr. Justice Ford on Thursday, he would have asked which of the two is speaking the truth? Is it Brigade-Major Paterson who said that there was a hole in the bridge or Mr. T. Cargill, who denied that there was a hole, and asserted that the bridge 'was in a thoroughly sound condition?' The question is simply whether Brigade Major Paterson in affirming that there was a hole is telling a lie, or is Mr. T. Cargill lying when he denies the assertion of the plaintiff? The answer has been given in plain unmistakeable terms by Mr. Justice Ford in his judgment on Thursday, which found that the facts of the case were against the defendants, and that the plaintiff had spoken the truth. It is unfortunate for the Municipal Commissioners, very unfortunate for Mr. Cargill, and unlucky for Mr. D. G. Presgrave, that the case was ever allowed to be brought into Court and judicially decided. It has opened our eyes to facts and allowed us to draw inference which are prejudicial to the Municipal department, and injurious to the reputation of the two official gentlemen we have alluded to. What strikes us in the case is, want of honesty, a trifling with truth and employment of pretences and insinuations, on the part of one of the officials which appears to argue that an Englishman changes his reputation for honourable dealing, for uprightness, and truthfulness, when he lives officially among the races whose stock-in-trade is lying, deceit, cunning and detestable perjury. With the majority of Englishmen, this is not the case; but there are instances at times that lead the ignorant foreign observer to form the opinion we have just indicated. Where Englishmen are charged with malpractices and moral obliquities while holding important posts in the East, their conduct is excused on the ground of the contagion to which they are daily exposed and which has vitiated their constitution. Such, perhaps, may be the excuse of Mr. T. Cargill in respect to the evidence he gave in this case. Be that as it may, we cannot overlook the fact that Mr. Cargill is responsible for the denial made by the defendants in their answer that the hole did exist, and that the bridge had been neglected, and how any man apprehending the obligations of an oath, could have made the statements Mr. Cargill did, is to us perfectly incomprehensible. Judging from the evidence, which was reported by our contemporary with great accuracy, it would appear that Mr. Cargill had been guilty of negligence in his work, and to screen himself he made the report that flatly contradicted the declarations of Brigade-Major Paterson, as well as the testimony given to support it, or he may have acted as he did to serve the purpose of his employers. Whatever the motive, the result is exactly the same, and scandalises, nay, stigmatises Mr. T. Cargill. Both on the ground of professional reputation and the higher considerations of honesty and moral truth, this gentleman is to be condemned for his share in the transaction, and he is responsible for the unfortunate position in which the defendants stood. Mr. D. G. Presgrave seems to have either acted under instructions or to have been blind [wilfully or otherwise we cannot tell] in regard to this bridge, he appears to have simply followed my leader in the matter, and a fair reflection of the odium which is attached to Mr. Cargill, falls on him. The conduct of one at least of the gentlemen is not compatible with the requirements of his position, and in the face of the evidence given in the case, we cannot but think that the leading culprit should meet with commensurate condemnation, for his behaviour and the subsidiary share Mr. Presgrave had in the transaction, cast a stain on the service to which they both belong. The case, however unfortunate, is not without its

use; it shows what reliance can be placed on some of the Government officials, and *ex uno disce omnes*, it shows, how statements contrary to honesty and wilful fabrications can be made for self-protection by those charged to supervise important branches of the public service, and points the moral that they very often escape censure because they escape observation. Whatever be the course adopted by the higher powers in this scandal, and overlook it they should not, let it be such as to express the utmost condemnation for such actions as this, which scandalises the service and fixes upon it an unmerited reproach, very difficult to be removed."

3. The defendants by the said article above set forth, meant among other things that the plaintiff had been guilty of the offence of perjury in his evidence before this Court in the aforesaid action.

4. The defendants in the said issue of the said newspaper, falsely and maliciously printed and published of the plaintiff a letter headed "The Municipal Engineer" and purporting to be signed "*Pro Bono Publico*," and containing the words following:—

"THE MUNICIPAL ENGINEER.

"To the Editor of the Straits Intelligence.

"SIR,—“It is an ill-wind that blows nobody good” and particularly so, when rate-payers find the Municipal Commissioners in a heap about the issue of Major Paterson’s case. Undoubtedly they had a smart lot of servants, and it is time now that a few of them should have feathers to their caps. Their Engineers are Gentlemen of no mean standing and mark, in fact, nonpareils! De Wind and Carrington are no match for them, as far as ingenuity goes; in their times, the Commissioners were never dragged before a Court of Law, neither were they called upon to pay a red cent. in the way of damages done, either to man or beast through their carelessness or supineness.

“Pray, what have we now to begin with? There is Mr. Winton’s horse, and now this bridge affair, not long ago the collapse of Clyde Terrace Bathing house resulting in the death of two unfortunates. How the Engineers got out of the scrape, ought to be a tale well told.

“The public are curious to know now, who and which of their servants are to be blamed in this bridge affair, Contractors or Engineers? Here is a nice nut to crack, and it is to be hoped that the Commissioners will exercise a wise discretion when sitting in judgment.

“Mr. Cargill [meaning the plaintiff in this action] should be called upon to show cause why the Commissioners should not dismiss him after his evidence, and conduct before His Honor Mr. Justice Ford. Pray, could they ever place any confidence and trust in a servant who so basely abused their confidence. By all means get rid of the old leaven if they have the interest of the public at heart: there is no doubt, there has been plenty of this sort of delusion practised on the unwary Commissioners. Their Engineer’s report on the bridge alone after the accident, points to this, for it is a scandalous piece of falsehood and mean to the extreme. Certainly, I have no other construction to put upon it.

“Putting aside all consideration, the Commissioners should have a pure atmosphere about their surroundings: they have, as their employes, men of all shades, color and creed. In deference to them, the Commissioners ought on no account yield to anything that may be construed into favoritism, their conduct should be above suspicion if they wish to let truthfulness, order, or discipline, have abiding place under their official roof.

“The public have not far to seek for a *fons et origo*; private practice is at the bottom of this laxity and supineness. Just so this is the *origo mali*.

“I remain,

“Yours obediently,

“PRO BONO PUBLICO.

“P.S.—What would have been the result if the whole structure had collapsed and sent Major Paterson to the bottom of the canal? Then and there, would a hue and cry be heard through the whole breadth of the Island. It will come to that yet, if the Commissioners place further confidence in a servant who has so shamefully abused his trust.

“4th October, 1882.”

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5. By reason of these premises the plaintiff was injured in his character and reputation.

The statement of defence is as follows :—

1. As to the second and fourth paragraphs of the plaintiff's statement of claim, the defendants deny that they or either of them falsely and maliciously printed and published the words therein set forth.

2. The defendants deny the allegations contained in the third and fifth paragraphs of the statement of claim.

3. The defendants also say that the words complained of were fair comments upon proceedings in a Court of Justice and were of general public interest, and the publication thereof was of benefit and advantage to the public.

4. And the defendants further say that the publication of the words complained of in the said newspaper was made fairly and *bonâ fide* and without any sinister or malicious motive and in the *bonâ fide* belief in the truth thereof and of every part thereof.

The definition of libel as given in *Starkie's Law of Slander and Libel* is that "any writings, pictures or signs which derogate from the character of an individual by imputing to him either bad actions or vicious principles, or which diminish his responsibility and abridge his comforts by exposing him to disgrace or ridicule, are actionable without proof of special damage;" in short, that an action lies for any false, malicious or personal imputation effected by such means, and tending to alter the party's situation in society for the worse. Undoubtedly the article and letter complained of come within this definition and are libellous. Unless the defendants can justify themselves on the grounds set out in their pleas, they are liable in damages. They have not attempted a justification on the ground of the truth of the imputations contained in these articles, but rest their defence upon the ground that they were fair comments upon proceedings in a Court of Justice. Now, the truth of the allegations, if they had been established, would have been a complete answer to the plaintiff's action. It is not so in Criminal proceedings, for by the Act 6 & 7 Vic., cap. 96. called Lord Campbell's Act, "the truth of the matter, if pleaded, may be enquired into, but shall not amount to a defence unless it was for the public benefit that the matter charged should be published." In Civil proceedings, however, to quote again from the author I have above referred to, "the truth of the imputation affords a decisive answer to an action for damages, for the plain reason that a guilty party has no right to a character free from that imputation; and if he has no right to it, he cannot in justice recover damages for the loss of it; it is *damnum absque injuria*;" the reason for the difference being that in criminal proceedings the interests of the public and the preservation of the public peace and good order have to be taken into consideration. The defendants therefore are committed by their pleadings to this—that whereas they had a complete answer to the action, if they could have shown the truth of the remarks complained of, they have found themselves unable, when those remarks are challenged, to do so. Then, are they justified on the ground that these remarks, which they implicitly admit are untrue, are a fair comment on the proceedings

in a Court of Justice? The latest and perhaps the best exposition of the right of fair comment on the proceedings of a Court of Justice was given by the late Lord Chief Justice Cockburn in his summing up to the Jury in the cases of *Woodgate v. Ridout*, and *Headley v. Barlow*, both reported in 4 F. & F., and referred to in the argument. In the former of these two cases, he says: "It is equally certain that fair comments upon the proceedings of a Court of Justice or the result of them are in like manner privileged and protected. The administration of justice is a matter of universal interest to the whole public. The direction of the Judge, the verdict of the Jury, the decree of a Court of Equity, may be all made subjects of free comment. It is the interest of all of us that it should be so. But in commenting on such matters, a public writer, as much as a private writer, is bound to attend to the truth and to put forward the truth, honestly and in good faith and to the best of his knowledge and ability. It is not to be expected, that in discharging this duty of a public journalist he will always be infallible. His judgment may be biassed one way or the other without the slightest reflection on his good faith, and therefore if his comments are fair, no one has a right to complain. But it is for the Jury to say whether a given comment upon the proceedings of a Court of Justice is a fair comment upon them or the result of them, or not." And in *Headley v. Barlow* the same learned Judge says: "The right of public discussion on matters of public interest is important; and it requires for its beneficial exercise that it should be exercised fully and freely, without being subject to too harsh or strict limitation, and so long as it is exercised fairly and honestly, it is protected or excused, even although it may incidentally involve the publication of defamatory matter. But at the same time the comments must be fair—that is, conceived in a fair spirit—in the spirit of fair discussion and not in spirit of reckless or inconsiderate imputation. That which is recklessly defamatory, can hardly be deemed fair, and the article which conveys a charge of recklessness with regard to truth and therefore recklessness of truth certainly is not consistent in any reasonable sense with fairness."

As in this Colony, the Judge has to discharge the duties of a Jury as well as of a Judge in Civil causes, it becomes simply a question for me to decide whether the articles complained of can be justified as fair comments upon the proceedings in Court, as reported in the *Singapore Daily Times*, upon the trial of "*Paterson v. the Municipal Commissioners*," before His Honor, Mr. Justice Ford. The evidence as given in the paper referred to of the 28th September, 1882, was substantially admitted, as was also, after evidence had been given of its accuracy, the judgment delivered by Mr. Justice Ford as reported in the issue of the same paper of the following day.

There were several points raised on behalf of the defendants at the trial of that case, but the point upon which the question involved in the present case turns, relates to the evidence given by the present plaintiff as to the existence of a hole in the bridge in the cross road from Tanglin Road to Alexandra Road, as sworn to by Brigade-Major Paterson and other witnesses. Now there

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can be no further question raised upon that point. The result of the trial was to decide that there was such a hole, and the plaintiff in that action recovered the damages he claimed. At the trial the present plaintiff, Mr. Cargill, gave evidence as follows:—

“In May last, I was asked to go and see the bridge in the cross road from Tanglin Road to Alexandra Road, in consequence of some claim made by Major Paterson against the Municipal Commissioners. That was three or four days after the date of the accident. I found the bridge in very good condition. I saw no hole or no mark of any hole having been filled up. Had there been anything of the sort, I should have seen it, especially in that bridge where there is little traffic and the signs of any repair would not be so readily obliterated as in town. Besides that, it was said, it was near the parapet, where there is still less traffic than in the centre of the road. I examined the beams from the under side. They were in very good condition. The wood of which they are formed [tampinis] is never attacked by white ants. No report was made to me by any Inspector or any body else before the accident, as to there being a hole there. A very heavy storm might wash away the metalling and leave a small hole. Rats, which are frequently found on the borders of these streams, might make a hole. I never saw a snake make a hole in a road. I have seen snakes behind the planking of a bridge. Such a situation is a favorite one with snakes.”

The learned Judge notwithstanding that evidence, found that there was such a hole, and gave his reasons for his decision. The Attorney-General, on behalf of the defendants, urged that the language used in the articles complained of was not stronger than that used by the learned Judge, although rougher terms were used and the expressions made use of were perhaps not so subtle and accurate. The point is a new one, and could not arise where the verdict is returned by a Jury; but I agree, that if it could be established that the writer had fairly and honestly, and allowing even a reasonable margin for misunderstanding, taken the judgment so delivered as his guide and endeavoured, although in rougher, and as he thought, more impressive language, to give the effect of it and dilate upon it, then it would be very difficult to say that he had exceeded the limits imposed upon fair comment. Now I come to the expressions so made use of by the learned Judge, who decided that not only was there a hole, but the existence of the hole was due to the negligence of the defendants in not keeping the bridge in a proper state of repair.

The following extracts from the judgment are those which relate to the evidence and conduct of the present plaintiff:—

“There could be no doubt that there was a hole there. There was, besides the evidence of Major Paterson himself and his two syces, the evidence of the syce in the employ of Major Hales, who saw the hole before the accident; and he should have to allude by and by to some other reasons why, he [the Judge] individually believed that there was a hole there on the date of the accident, as alleged for the plaintiff. The case which the defendants submitted to prove that there was no hole ever there, would convince no one. First, the Engineer was called, and he stated that he went to the place described as the scene of the accident, three or four days after the accident occurred, and by that time, he told them, there was no hole to be seen, and no trace of any hole having been filled up. And on such a foundation as that, the defendants did not hesitate to ask the Court to believe that the plaintiff, Brigade-Major Paterson, made a false claim against them and then came here with a case which had no foundation in fact. That, as he had already said, was at least unfortunate”

"Against the evidence of the syce, there was that of the Engineer to the Commissioners, who was called for the defence. He did not deny in terms the case for the plaintiff, although before dealing with the evidence of that officer, he might call attention to a report which he made at the time to the Commissioners as to the state of this bridge,—a report which, he must say, looking to the evidence of the syce and to what he himself [Mr. Justice Ford] saw with his own eyes on the two occasions he visited the bridge, seemed to him to be the most extraordinary letter he had ever read emanating from a skilled witness. The report was as follows:—

"I inspected the bridge in question and found it to be in good traffic order. There was nothing in the state of the structure that would have conduced to the accident complained of. The bridge was repaired with a few planks on one of the abutments, and some fresh rails put in the parapets. All this was completed by 25th April, and the bridge was then in a thoroughly sound condition. The accident occurred on the 18th instant; but as nothing had been done to the bridge between that date and the date of my inspection, or has been done since, the bridge is in precisely the same condition as it was at the time of the alleged accident. The assertion that the bridge "gave way," is a mistake. The planking and roadway of the bridge are in very good order. I cannot myself find any cause for attributing the accident to any defect in the bridge.

(Sd.) "T. CARGILL,
"M. Engineer.
"3/5/82."

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"Hence came to what he himself [the Judge] saw there; he thought it right to visit the place and see the bridge himself, taking upon himself the right, the Judge always has of exercising what is called in the case of a Jury, the order to view. He was bound to say that nothing was more calculated to confirm the statements of and for the plaintiff, or more calculated to discredit the case put forward by or on behalf of the Commissioners, than what he found there. He was really so surprised after the first visit, on considering the whole facts over, that he was afraid his inspection must have been too hasty; the whole condition of the bridge seemed to him so bad, that he went a second time, to make sure there was no mistake. It seemed to his mind beyond doubt that the bridge had been neglected. The large beam upon which rests the last plank that nearest the road, was simply eaten away by white ants. They had absolutely eaten away some twelve inches of the beam. It was held in its place by an iron bolt or rod of iron which should have kept it to the other beam. There was simply no wood there at all. It was gone. The planks, he could not see, but he could fairly judge of their condition as a whole by the state of the end exposed. Of that, one half was entirely gone, and if one put the weight of his hand upon it, it went wagging up and down as easily as could be wished. It was simply held in the place where it was by an accumulation of earthen matter. There were also, he found, most marked indications of a hole having been filled up. He considered the whole formation of the place, gave the most absolute proof that a hole of about the size of that described by Major Paterson had been filled up. The roadway consisted of laterite; but there was one solitary portion in just such a position as that described by Major Paterson, some 1½ ft. square, formed of chopped granite. These were all indications of a hole having been filled up, and he had not the slightest doubt in saying that there had been a hole; and no doubt these men whom the contractor described as always working about the road at that time, had, after the accident, seen the hole and filled it up. Of that he had not the slightest doubt. In face of what he had seen with his own eyes, he confessed he was at a loss to understand how a gentleman in the position of Engineer to the Municipal Commissioners could come into Court and give such evidence as he had done.

"Mr. Bond: Perhaps, my Lord, you will allow me to—

"His Lordship: No. That is my opinion from the Bench of the evidence of the Municipal Engineer."

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I can find nothing in these remarks which would justify any reasonable man in inferring that the learned Judge imputed to the plaintiff that he had been guilty of deliberate perjury to screen himself from the consequences of his own negligence. The defendants do not say so now—in fact, by their Counsel at the trial, they admitted that it was not necessary to admit that either Brigade-Major Paterson or Mr. Cargill told a lie, and Mr. Harwood stated that he believed now that Mr. Cargill had overlooked the hole. No doubt, as the learned Judge stated, and stated emphatically, it was difficult to understand how the Municipal Engineer could have gone to look for the hole or traces of the hole and failed to find them; but we are not irresistibly driven to the conclusion that the plaintiff did see the hole, and deliberately perjured himself when he said in Court that he did not, and there is nothing in the judgment that would reasonably warrant such an inference. The defendants, however, drew it and charged the plaintiff with “lying” when he gave his evidence in Court. A more odious charge cannot well be conceived; and it is libellous on the face of it unless justified. The plaintiff is directly referred to in the following passage:—

“What strikes us in the case, is want of honesty, a trifling with truth and employment of pretences and insinuations, on the part of one of the officials which appears to argue that an Englishman changes his reputation for honourable dealing, for uprightness, and truthfulness, when he lives officially among the races whose stock-in-trade is lying, deceit, cunning and detestable perjury. . . . Where Englishmen are charged with malpractices and moral obliquities while holding important posts in the East, their conduct is excused on the ground of the contagion to which they are daily exposed and which has vitiated their constitution. Such, perhaps, may be the excuse of Mr. T. Cargill in respect to the evidence he gave in this case.

It is unnecessary to quote the further libellous statements made in the same article and in the letter published in the same paper.

The plaintiff is held up to public execration as having committed the most detestable perjury from the meanest of motives, and I consider that the defendants’ attempt at justification has completely failed.

It is really, only a question of damages, and upon this point I may again refer to the language of the learned Judge whom I have before quoted, in his summing up to the Jury in *Woodgate v. Ridout*. “And I cannot help observing that we have not here to do with “an apologetic defence, but there is an attempt to show that notwithstanding all that has taken place, the conduct of Mr. Woodgate was deservedly held up for execration. That is for you to consider.” And in conclusion he tells them: “It is a case of “the utmost gravity. On the one hand, let it not be supposed “that the law imposes any undue restraint upon the freest and “fullest comment upon all that passes in Public Courts of Justice, “for that the Administration of Justice should be made a subject “for the exercise of public discussion is a matter of the most essential importance. But on the other hand, it behoves those who “pass judgment on those who are suitors or witnesses in Courts “of Justice not to give reckless and too harsh, uncharitable views

"of the conduct of others; but to remember that they are bound to exercise a fair, an honest and an impartial judgment upon those whom they hold up to public obloquy;" and the result in that case was that the plaintiff, an Attorney, who had been villified in the columns of the *Morning Post*, in a manner somewhat similar to that in which the plaintiff has been treated in the defendants' paper, recovered £1,000 damages.

In the present case, there has been no attempt at an apology, although the defendants had found out, at all events, so far back, as the 8th December, when the statements of defence was filed, that they could not attempt to urge that the injurious allegations complained of were true. It is impossible, therefore, now to treat this as a case for nominal damages. The plaintiff does not wish for vindictive, but for reasonable damages, and to those he is entitled. I find a verdict for the plaintiff for \$250 damages and costs.

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When one and the same person is appointed executor and trustee under a Will, his executorship ceases, and his trusteeship commences on the estates vesting in him [by virtue of the Will and his assent to the devise,] subject to the specific trust declared by the Will.

This Court is bound by the Letters Patent of 1855, to allow a reasonable commission to an executor, [out of the testator's estate,] for his "pains and trouble" in administering the same; but there is no fixed rule to allow him 5 per cent. on the amount of the assets, whether there be appreciable trouble or not.

The rate of commission might be even greater or less, according to the nature of the estate administered and the trouble and pains necessarily taken by the executor: the amount of assets has little to do with it.

In the case of a testator dying perfectly solvent, with a balance of ready money in hand, and having devised his real estate specifically among certain devisees, the executor's pains and trouble would be so trifling, that 5 per cent. commission to him would not be just or reasonable.

The fixed rate in India, of 5 per cent. on receipts and payments, is not binding here, inasmuch as the incidents of an executorship in India and this Colony, are not the same. Here he succeeds to real estate under the Act XX of 1837.

PENANG.
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May 1.

This was a suit for the administration of the estate of one Mahomed Sultan, deceased, to whose estate the defendant was executor. The plaintiffs were two of the beneficiaries under the Will. The question here arose on the report of the Acting Registrar and came before the Court by way of exception thereto. The facts of the case and nature of the arguments of Council fully appear in the judgment.

Ross, for defendant in support of exceptions referred to *Matthew v. Bayshawe*, 14 Beav. 123; *Robinson v. Pett*, 2 White & Tudor's, L. C. in Eq. p. 206; *Letters Patent* of 10th August, 1855;

[a] See In the goods of William Russell, deceased, Ecclesiastical cases, vol. II. of these reports. 

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18 & 19 Vic. c. 93 sec. 4; *Chetham v. Lord Audley*, 4 Vesey 72; *Campbell v. Campbell*, 11 L. J. [N.S.] Ch. p. 382; s. c. 13 Simon 198; *Lim Sim Poh v. Lim Kin*, Straits Law Reports, 239-40; *Lim Ah Yong v. Khoo Khay Chan*, Ibid 384; *Vander Hoven v. Surin*, Penang, 1865. [a]

Van Someren for plaintiffs, in support of Report, referred to 2 *Wms. on Executors*, [6th ed.] pp. 1530, 1710, and *Campbell v. Campbell*, 2 Y. & Coll, 807.

Cur. Adv. Vult.

July 4. *Wood, J.* Mahomed Sultan Merican by his Will bearing date, October 17th, 1880, appointed the defendant Golam Kader with another who renounced Probate and a third a minor who has not yet joined in the Probate, his executors, thus leaving the defendant the only effective executor.

By this Will he directed that his executors should sell certain specific property for the payment of his debts and for certain other definite purposes, which need not be specially mentioned.

He further made certain specific devises of land in favour of certain of his sons and daughters, and by para. 6 of his Will he says:

6th. "My Executors shall make bills of sale for the property above described in the names of each one of my children as stated above, and deliver to them when of age, or after they have been married, during which time the rents of the above shops shall be received by my executors, and after paying from it for the repairs of the said shops, the remainder shall be given to my wife Wanchee Incheh Thyboo, she after supplying my children with their food and clothing, shall keep the remainder for the childrens' marriage expenses and also get them married. My executors and my wife shall have my children married to such persons as they may think fit and good."

Then follow provisions in case of the death of any of the children for the division of the shares of the children so dying among the surviving children.

The defendant entered upon his executorship and subsequently this suit was brought by the plaintiffs' beneficiaries under the Will, and in due course it was referred to Mr. Kyshe the Acting-Registrar of the Court for his report.

By his report, it appears that the defendant had filed accounts which it is admitted are correct, so far as the details of receipts and expenditure is concerned—but the defendant as executor claims the sum of \$759.31 his commission as executor at the rate of 5 per cent. on \$15,186.25 the entire value of the Estate, real and personal of which the testator died possessed.

The Registrar on this matter reports as follows:

"S. 5. "I find defendant has received Estate to the amount of \$5,966.25 and has paid, or is entitled to be allowed on account of the said Estate sums amounting to the sum of \$5,275.22, this would leave a balance of \$711.03 in his hands; but against this amount must be deducted the commission that the defendant is entitled to according to my judgment [amounting to \$299.31½] actually leaving a balance of \$411.71½ due by him.

[a] not reported.

"S. 6. "This sum of \$411.71½ I find due by allowing the defendant "only commission on the monies shewn in his accounts A. and B. to have "come into his hands, and by disallowing the extra commission charged by "him on the unsold property, the value of which he estimates at \$9,200 "[annexure C.]

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On the case coming on for hearing on May 1st, Mr. Ross for the defendant, stated the point which was simply, whether it being admitted by the plaintiffs that the defendant is entitled to commission at the rate of 5 per cent. upon property administered by him; he is entitled to that commission upon property which had not then been handed over, *viz.*, the unsold and undisposed of property adverted to in section 6 of the Registrar's report.

On opening the case thus far, I required to know under what law or custom defendant claimed to be entitled to his commission of 5 per cent. on property administered, and the case stood over for further elucidation of this point for which the parties were not at that time prepared, and accordingly on a subsequent day, May 8th, the matter was further gone into. Mr. Ross explained that by *Letters Patent* for reconstituting the Court of Judicature of Prince of Wales' Island, Singapore and Malacca, of 10th August, 1855, p. 17 of Edition of 1856, it is directed as follows:—"And we "further ordain and declare that it shall be lawful for the said "Court to allow to any Executor or Administrator of the effects "of any deceased person or persons such commission or percentage "out of his, her or their *Assets* as shall be just and reasonable for "the pains and trouble therein."

By 18 & 19 Victoria, chapter 93 [14th August, 1855] being an Act to amend certain Acts relating to the Court of Judicature of Prince of Wales' Island, Singapore and Malacca, after reciting the grant of the said *Letters Patent* of 1855,—by section 4 enacts among other things, that such *Letters Patent* "are in all respects ratified and confirmed." He therefore contended that these *Letters Patent* although their purport and effect is generally to reconstitute the Court of Judicature, and relate to matters of jurisdiction and practice, still when they enact matter which varies law and practice are enactments to all intents and purposes and thus that the direction above quoted relating to the remuneration of executors was effective to establish the law of the Settlements in this respect.

This law, he further contended was unaffected by any subsequent enactment constituting our Courts, dealing with its jurisdiction—or affecting its practice.

And since by Indian Act 20 of 1837, it is enacted "That from "the 1st day of October, 1837, all immoveable property within the "jurisdiction of the Court of Judicature of Prince of Wales' "Island, Singapore and Malacca, shall, as regards the transmission "of such property on the death and intestacy of any person "having a beneficial interest in the same, or by the last Will of any "such person, be taken to be, and to have been of the nature of "chattels real and not of freehold" and that for many years past, probably, ever since the year last mentioned, 1837, it has been customary for executors and administrators in this Settlement to

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retain for themselves a commission of 5 per cent. on all the estate real and personal in which the testator had a beneficial interest, which estate was looked upon as *assets*, whatever may be the nature of the disposition made of it by the testator, and such practice and custom has been acquiesced in by all parties concerned sometimes in the case of very large estates and that accounts involving this claim for commission have been passed through the Registrar's office,—and allowed by that officer in numberless reports—though the question of the legality of the claim has never been made the subject of judicial decision by the Supreme Court, such practice and rule for the executor and administrator to receive 5 per cent. on the value of the estate was just and reasonable and would be supported by the Supreme Court of the Colony. Mr. Van Someren for the plaintiffs, agreed to the reasoning above advanced by Mr. Ross and contended that the defendant was entitled to retain this sum of 5 per cent on all the assets of the testator, including the property which the executor under the terms of the Will held under trust to convey to the several persons referred to in the clause 6 of the Will adverted to, on their coming of age or marriage, but which have not yet been so conveyed—but contended that the defendant was premature in advancing any such claim until conveyance in accordance with the terms of the Will.

Upon this point I am of opinion, that the defendant has not established his right to any such commission as is contended for, but upon grounds distinct from those advanced before me in argument, though such grounds were sufficiently discussed in the course of the hearing, and which grounds I now proceed to explain.

It is admitted to be the practice of this Court, that following the law in England, trustees as such have no claim to any commission at all. In the case before me, the executor is both executor and trustee, and the Court has to distinguish between his acts and duties in these several capacities, I entertain no doubt, as I have already said in the course of the argument, that his executorship ceases and his trusteeship commences on the estates vesting in him, subject to the specific trusts detailed in clause 6 of the Will—and as such executor, I cannot see that he has acquired any right on the score of “pains and trouble” to a commission of 5 per cent on the whole amount of the estate by virtue of any fixed rule to that effect, though I think, that the estate did fairly vest in him as executor by virtue of the Will and his assent to his own devise.

I entertain no doubt that the Court is bound by the *Letters Patent* of 1855, to “allow to any executor or administrator of the “effects of any deceased person or persons such commission or “per centage out of his, her or their assets as shall be just and “reasonable for their pains and trouble therein” but I cannot consider it bound by any fixed rule for claiming a commission of 5 per cent on the amount of all assets whether there be appreciable pains and trouble or no.

The receipt of such a fixed commission I look upon as an abuse which has crept into practice from a not unreasonable disinclination of parties interested under a Will, or an intestacy to

dispute the claims of a personal representative, a claim which the officer of the Court in times past who was often called upon to act as administrator appointed by the Court—could hardly be expected to look on with disfavor. It might be, that the commission for extra pains and labour bestowed by the executor, or administrator, might be even greater than 5 per cent. on the amount of the assets—but in the case of a testator dying perfectly solvent with a balance of ready money in hand and having devised his real estate specifically among certain devisees, the executor's pains and trouble which would be simply the pains and trouble of proving the Will, paying funeral expenses—and assenting to the specific devisees for the execution of a formal conveyance in such a case is a practice uncalled for by any legal necessity, could hardly be very meritorious; and in the case of a large estate, say \$500,000 not by any means an extreme amount in this Settlement, the "pains and labour" must indeed be more than ordinarily great, which would justify the Court in awarding \$25,000 as a just and reasonable remuneration.

The rule as we are told, is in India, 5 per cent. on receipt and payments, where the incidents of an executorship are the same as in England, not where as here he succeeds to all real estate a mode of reckoning which in some respects carries with it the principle of reward for pains and trouble, and I am far from saying, that the Court would not in small estates and under ordinary circumstances, deal with the commission from assets, so as to arrive at a somewhat similar result to that which now prevails, *viz.*, 5 per cent. on the amount of assets, but it must be borne in mind, that the amount of assets has little to do with pains and trouble, which, in the case of mere assent to devisees is almost *nil*—that excessive remuneration for trifling services is a practice which cannot be sanctioned—and that the discretion vested in this Court to allow what is just and reasonable can be limited by no fixed practice which has not received its direct approval, which I understand has never been the case—what may be just and reasonable commission in this case it may be difficult to say. The defendant's duties as executor seem to have been troublesome, and he might well be entitled to more than 5 per cent. on the sums he has actually received as executor, or even to 5 per cent. on receipts and 5 per cent. on expenditure within the strict scope of his duties as executor; the total amount of receipts and expenditure would amount in round numbers to \$10,000 as I understand the accounts; the commission on which at 5 per cent. would be \$500, or thereabouts, but that he should claim and be allowed a fixed rate of 5 per cent. on the value of the estate, is a practice which I feel myself called upon to disallow. As the parties seem desirous to settle the case in an amicable spirit, and now by their respective counsel intimate that they accept the suggestion above made by me, the report will be confirmed, subject to the modification above adverted to.

The costs of this cause, I understand, are to be paid by consent out of the estate, a proposal in which I concur.

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ATTORNEY-GENERAL v. HAJEE ABDUL CADER.

PENANG.

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May 8.

A testator devised certain lands to charitable purposes which he directed to be under the management of his sons, nobody else being allowed to interfere therewith—and towards the conclusion of his Will, stated as follows:—"My son, Oodman Nina, will act as my executor, and on his death, my second son Oodman Sah—in the absence of my sons, their sons will succeed as executors.....they will succeed one to the other, the eldest son first, and the next afterwards, and so forth."

Held, that the eldest grandson in point of age,—and without reference to his being the son of the first or second son,—was entitled to succeed as executor—and that the testator, judging from his language, intended, such his executors, to be also the trustees of the charity; and that consequently on the death of the two sons, the eldest grandson, as aforesaid, was the trustee of the charity.

In the goods of Cauder Mohuddeen, deceased, Straits Law Reports, p. 281, observed on.

This was an information by the Attorney-General, relative to a charity created by the Will of one Kader Mydeen, otherwise called Captain Kling,—seeking, among other things, to have it declared that certain lands formed part of the subject-matter of the devise to such charitable purposes—and to have it further declared that the defendant, who was the then executor of the said Kader Mydeen, deceased, and acting as the *de facto* trustee of the said charity—was not the trustee thereof; but the relator Kader Mydeen *alias* Pawan Chee, was *de jure* the trustee thereof, and that the defendant might be restrained from selling, encumbering or otherwise, howsoever, interfering with the said lands. The defendant,—contending that the land aforesaid did not form part of the subject-matter of the devise, but the private property of the testator,—had sold certain portions of the said land, and was intending to sell more, when this suit was commenced. At the trial in August, 1880, this Court had made a decree in this suit, declaring such lands to be part of the subject-matter of the devise of the aforesaid charity, but reserved the question of the removal of the defendant from such alleged trusteeship, until his accounts, which were referred to the Registrar, were enquired into, and reported on. These accounts were subsequently enquired into, and resulted in a sum of \$900 odd, being found due by the defendant; and on submission of the Registrar's report to that effect, to this Court, the report was confirmed, and the aforesaid amount ordered to be paid into Court. The defendant paid in this amount, in pursuance of the said order. It did not appear that the sales of portions of the said lands by the defendant, and his contention, that it was not portion of the charity land was otherwise than *bona fide*, but done under a mistake: the items disallowed in his accounts by the Registrar, also did not appear to have been entered with any improper motive, nor the aforesaid balance, fraudulently held back by him. The only remaining question, as regarded the right of the defendant to act as trustee, now came on to be disposed of. The facts on which this question arose were the following:—The testator Kader Mydeen, had made his Will creating the charity aforesaid, and directing that the same was to be managed by his eldest son Oodman Nina, his executor, and on his death, his second son Oodman Sah, his executor, and in the absence of his sons, their sons to succeed as executors, the eldest

son first, and the next afterwards and so on. The testator died in 1834, and his eldest son, Oodman Nina proved his Will and obtained probate thereof, and acted in the affairs of the estate, and as trustee, under the Will, of the charity thereby created, until his death, in 1860. On his death, the second son Oodman Sah obtained probate to the testator's Will, and acted therein, and intermeddled in the matters of charity, and acting as the trustee thereof, until his death, in 1864. In 1867, the defendant, the eldest son of the said Oodman Sah [the second son and executor] applied for probate of the said Will, which was refused. In 1869, the defendant again applied for such probate, which application was opposed by the relator, Kader Mydeen, on the ground that he was entitled to act as executor, and was meant by the "eldest" grandson. At such trial, it appeared, the relator was the eldest son of Oodman Nina, the eldest son of the testator, and the first executor; but the defendant, though the eldest son of the second testator's second son Oodman Sah, was in years, older than the relator. Sir William Hackett, the then Judge, required an affidavit to be filed, that beside the charity lands, there was private property of the testator to be administered: this affidavit was filed by the defendant. On these facts, and on the construction of the Will, the said learned Judge held, by "eldest" grandson, the testator meant, his grandson who was oldest in age, and without reference to such grandson being the son of his first or his second son, and accordingly granted probate to the defendant. The defendant, some years after getting this probate, claimed to act as trustee of the charity, and taking that office on himself, began to intermeddle with, and manage the affairs of the charity. On these facts,

Van Someren for the plaintiff, now moved that it might be declared that the defendant was not legally the trustee of the charity, but that the relator, Kader Mydeen was,—and that the defendant be restrained from intermeddling with the affairs of the charity. He contended, that although no fraud or misconduct could be shewn on the part of the defendant, yet, as on the death of Oodman Nina, the first executor and trustee, the property devolved on the relator Kader Mydeen as his heir, as trustee—and the case was not affected by the Act XX of 1837, the said Oodman Nina, not being the beneficial owner under the charitable trust—the defendant was not the trustee, and did not represent the charity, and should be restrained—in fact, this had been decided by Sir Benson Maxwell on the application by defendant, in 1867 for probate [a], the probate obtained by the defendant in 1869 did not enable him to act as trustee of the charity—it was intended for the testator's private property only. The will did not appoint the defendant trustee,—nor yet his father. The words were "My son Oodman Nina will act as my executor, and on his death, my second son Oodmansah—in the absence of my sons, their sons will succeed one to the other, the eldest son first, and the next afterwards, and so forth." Sir William Hackett, in 1869 had held this last clause, meant the eldest grandson, of the grandsons as a

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[a] Straits Law Reports, p. 281.

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class—but he could not, and did not,—by requiring the affidavit of private property,—have meant to interfere with the decision of Sir Benson Maxwell in 1867, who distinctly held that neither the second son Oodmansah, nor the eldest grandson, had a right to be trustee. That decision he contended also, held the heir of the first executor and trustee, was the trustee of the charity,—and that person was the Plaintiff.

Thomas, for defendant contended, that the defendant had a right to his status as trustee. He was the eldest grandson who was declared by Sir William Hackett, to be the person named in the Will as successor to the second son—and on that ground, obtained probate of the Will. That the defendant had acted as trustee, for many years and no misconduct had been proved against him.

Wood, J. was of opinion that the decision of Sir Benson Maxwell in 1867 did not decide the question of who was or was not trustee of the charity—the sole question before him was, whether probate should be granted to the defendant or not—and he held it should not. It was true, some expressions appeared to have dropped from the learned judge relative to the relator [the heir of the first trustee] representing the charity—but that, his Lordship considered quite extra-judicial and not binding on the Court on this occasion. His Lordship further considered that the declaration of Sir William Hackett in 1869, was conclusive and binding on him—that on that occasion the Will had been construed, and the defendant was decided to be meant as the “eldest” grandson. He considered that the Testator intended by the language he had used that his sons and grandsons were to act in succession, both as executors and trustees of the charity—and as the clause relating to the succession of the grandson has been held to mean the defendant, the defendant was entitled to be, and to continue to act as, the trustee of the charity. All other points in the suit having been disposed of, his Lordship ordered the costs of all parties in the whole suit, to come out of the charity estate.

Order accordingly.

WYNDHAM v. HANSEN.

SINGAPORE.

FORD J.
1883.

May 11.

A hotel-keeper has a lien on his lodger's clothing and goods, for unpaid bills, and incurs no liability in detaining the same under such circumstances.

This was an action brought by one John Wyndham an Engineer, out of employment, against one J. Hansen, proprietor of the Alexandria Hotel, to recover possession of his boxes and clothing, or their value estimated at \$100, and the further sum of \$150 as damages for the wrongful detention of his first Engineer's and second Engineer's certificates from 13th January to 4th March, 1883. The defence was, that the plaintiff left the hotel without paying his bill, and the defendant claimed a lien upon the articles left by the plaintiff in the room occupied by him.

The defendant denied having detained the plaintiff's certificate of competency as second Engineer by the Board of Trade, and certificates of good character, and stated that some time after the plaintiff left the hotel, a certificate of competency and other papers were found in one of the table drawers of the room in which the plaintiff stayed; the certificate and other papers were forwarded to the plaintiff at the Singapore Hotel, where the plaintiff then stayed, by one of the defendant's boarders immediately after they were found. The defendant claimed from the plaintiff the sum of \$47.85, being the amount owing by the plaintiff to the defendant at the time he quitted his hotel. The plaintiff appeared in person [*formá pauperis*].

C. K. E. Woods, for the defendant.

Ford, J. This is a case in which it seems to me that the plaintiff is quite in the wrong, and I am rather surprised that he was successful in getting leave to sue as a pauper. As to the wrongful retention of his clothes, I need hardly say the clothes are the inn-keeper's; he has the right to the clothes until his bill is paid. So that his action in retaining possession of them was not tortuous in any respect. The bill is admitted to be right in all but an item of \$1.50 and another of \$11.95. Even deducting these two, there would still be a balance in favour of the defendant for which he would have his lien and be entitled to keep the clothes. But it seems to me that these items of \$11.95 and \$1.50 for washing, were, clearly incurred by the plaintiff, and that the quantity of drink he had consumed must have caused him to forget it. That is the slightest explanation of it. There are the chits signed in his own hand and the account properly made up. The defendant's claim is therefore fully allowed. In respect of plaintiff's claim for damages for the retention of his clothes, &c., he must of course be non-suited. There is no evidence whatever that Mr. Hansen ever detained the certificate in any shape or form, and the plaintiff must be non-suited in his claim for damages. It seems to me that in his being allowed to sue as a pauper, a perversion of the practice of the Court and the purpose of the provision has been committed. He may not be able to pay now but he may at some future time. The usual costs will be allowed.

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CLUTTON v. MCGILLEVRAY.

The presumption that an agent has communicated his knowledge of certain facts, to his principal, is rebutted, if in such transaction, the agent is committing a fraud, which makes concealment of such facts from his principal, necessary.

Where therefore one and the same person was employed by both plaintiff and defendant as a scrivener to invest their monies and prepare the necessary papers for them, and the agent having got possession of the title deeds from the defendant, the first mortgagee thereof, in disobedience to the express instructions of his principal, [the defendant] to take a remortgage of such property—went with the said deeds to the plaintiff, and obtained a loan from him, on the mortgage of such property, as a first mortgage, but never, in fact, communicated to the plaintiff, the existence of the defendant's mortgage, and never returned to the defendant's mortgagor, his mortgage bond, or paid the defendant the amount, he [the agent] had received thereon, but appropriated the monies obtained on the mortgage from the plaintiff, and also made false entries in his

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accounts with the defendant, of such a re-mortgage to him of the same property, but some fictitious person.

Held, that *Kennedy v. Green*, 3 M. & K. 609, applied, and the knowledge of the agent could not be imputed to the plaintiff, so as to affect him with implied or constructive notice; and he was therefore entitled to the possession of the title deeds as against the defendant, the first mortgagee.

This was an action to recover possession of title deeds. It appeared that the land and deeds belonged to one Goh Ah Chong, who had mortgaged them, through one Abdul Majid, to the defendant some time previous to this action; that the said Goh Ah Chong had arranged with a third party for the sale of the property to him, and had been to the said Abdul Majid about it; that Abdul Majid communicated the fact to the defendant, who handed the deeds to him [Abdul Majid], in order to receive the amount due on the mortgage, and after the conveyance of the land by Goh Ah Chong to the purchaser, to take a re-mortgage of such lands from such purchaser; that Abdul Majid,—who had always acted for the defendant in investing his monies, calling in the same, collecting his interest, and the like—accordingly received the title deeds from the defendant for that purpose; that after getting the deeds, he got the said Goh Ah Chong to convey the land to the purchaser, and took the purchaser to the plaintiff, and obtained of the plaintiff, for such purchaser, a loan of \$250 on the mortgage of such lands, in order to enable him to pay the purchase money therefor; that the plaintiff also frequently had employed the said Abdul Majid to obtain investments for him, and to draw the necessary papers: the title of the property offered in mortgage however, was always investigated by the plaintiff [who was a Solicitor] personally; that the plaintiff after examining the deeds in question, accepted a mortgage of the said lands, and gave a cheque payable, as customary, to the said Abdul Majid, and then, also, as customary, handed the title deeds back to the said Abdul Majid, to enable him to have the conveyance from the said Goh Ah Chong to the purchaser, registered in the Land Office; that the said Abdul Majid cashed the cheque, but it did not clearly appear what he did with the money, except that he represented to the defendant's mortgagor, the said Goh Ah Chong, that his mortgage to the defendant had been satisfied; he did not, however, return him his mortgage bond, but promised to do this at some future time; that the defendant never received the money from Abdul Majid nor any other bond or deeds; that the said Abdul Majid took, on behalf of the plaintiff, the deeds to the Land Office to be registered as aforesaid, leaving however, with the plaintiff, the mortgage bond from the purchaser to him; that before these deeds could be registered, the said Abdul Majid died, and one Hassan Kudus was employed by the defendant to look up his papers, and trace among other things, his mortgage bond and title deeds aforesaid; that the said Hassan Kudus accordingly did this, and found the title deeds aforesaid in the Land Office; and these, together with the conveyance from the said Goh Ah Chong to the purchaser, he took away and handed to the defendant. It was for this detention by the defendant of these deeds, that the plaintiff now sued. Among the papers and accounts of the said Abdul Majid, after his death,

were found, by the said Hassan Kudus, the original mortgage bond from Goh Ah Chong to the defendant uncanceled; also another mortgage bond of the same property, purporting to be from some unknown person, to the defendant; and in the ledger, he kept for the defendant, an entry of this unknown mortgage to the defendant, for the sum formerly advanced to Goh Ah Chong by the defendant, on the same property, was also found. This entry, it was clear, was a false one, as the property never belonged to such alleged mortgagor; was in fact, on the date of the said entry, conveyed by the said Goh Ah Chong to the purchaser aforesaid, and by him mortgaged to the plaintiff as already stated; no traces of this unknown mortgagor, could be found. The question was, who was entitled in priority, to the possession of these deeds, and this depended on whether the plaintiff had, or had not, notice of the defendant's mortgage. The plaintiff had no actual notice of it, nor had the said Abdul Majid, in fact, communicated such knowledge to him.

Thomas, for defendant contended, that as Abdul Majid was agent of the plaintiff, as well as of the defendant, his [Majid's] knowledge, must be taken to be that of the plaintiff; so that the plaintiff had constructive or implied notice of the defendant's mortgage, and so must be postponed to the defendant.

E. W. Presgrave, for the plaintiff contended, that on the facts, the defendant must, as against the plaintiff, be taken to have been paid off, as Majid, his agent, had actually received the money—that Majid was in fact, the defendant's general agent. *Chitty on Contracts*, [11th ed.] 198; *Story on Agency* [8th ed.] ss. 58-60; 73-97; 126-127;—that Majid was committing a fraud, and the presumption of his having communicated to the plaintiff, the existence of the defendant's mortgage, was therefore rebutted. *Kennedy v. Green*, 3 M. & K. 699; *Rolland v. Hart*, 6 L. R. Ch. App. 678; *Eaten v. Pemberton*, 3 De Gex & J. 547; *Perry Herrick v. Attwood*, 25 Beav. 205; on appl. 29 L. J. Ch. [N. S.] 121; *Rice v. Rice*, 23 L. J. Ch. [N. S.] 289; *Clerk v. Palmer*, 21 L. R. Ch. Div. 124; *Cave v. Cave*, 15 L. R. Ch. Div. 637; *Atterbury v. Wallis*, 8 De G. M. & G. 454; *Re European Bank*, 5 L. R. Ch. Ap. 358; *Hewette v. Loosemore*, 9 Hare, 449, 451, 455; *Kettleworth v. Watson*, 21 L. R. Ch. Div. 685, 704-7;—that Majid, in fact, was agent of plaintiff for only a limited purpose—it was no part of his duty to investigate the title for plaintiff, this the plaintiff personally did, and it was not therefore incumbent on him to disclose the existence of defendant's mortgage. *Wylie v. Pollen*, 32 L. J. Ch. [N. S.] 782;—that the defendant having parted with his deeds to Abdul Majid and the mortgagor Goh Ah Chong, and put it in their power to commit the fraud, could not claim priority against the plaintiff, who was a purchaser for value, without notice. *Layard v. Maude*, 4 L. R. Eq. 397; *Briggs v. Jones*, 10 L. R. Eq. 92.

Thomas in reply contended, that the only point was whether *Kennedy v. Green* applied—that the circumstances of the case must be looked at, as they governed the case—that there was no such fraud here, as made concealment from the plaintiff, by Majid, of the defendant's mortgage, absolutely necessary, and

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Atterbury v. Wallis [supra], *Hewette v. Loosemore* [supra], and *Thompson v. Cartwright*, 33 Beav. 174, applied.

Wood, J. I am of opinion that the case of *Kennedy v. Green* applies. I hold, as matter of fact, that in this case Abdul Majid, in disobeying the orders of Mr. McGillevray in obtaining the \$250 from Mr. Clutton, and his subsequent non-payment to Mr. McGillevray, and false entries as to facts, *vis.*, the existence of a mortgage to Mr. McGillevray, shew fraud *ab initio*, and a consequent reason for non-disclosure of the facts of the case, *vis.*, his possession of the deeds in trust, to obtain a re-mortgage in favor of Mr. McGillevray, which, as a fact, it may consequently be inferred, he did not communicate, and so *Kennedy v. Green* applies. On the ground therefore that Mr. Clutton is a purchaser, *pro tanto* [*vis.* a mortgage] for value, without notice, I hold him entitled to judgment for the recovery of the deeds he seeks possession of.

Judgment for Plaintiff.

July 25. *Presgrave*, on behalf of the plaintiff, mentioned, that the judgment had been given for the plaintiff for the possession of the deeds on the point that he had no notice; but as it was possible the plaintiff would be paid up, or would realize more than his claim,—a question would arise as to whether the defendant, or the mortgagor, was entitled to the deeds or surplus: he therefore asked, that the Court would decide whether the plaintiff was only a prior, or the sole mortgagee of the land—in fact whether Mr. McGillevray had, on the facts, been paid off.

Thomas for defendant, did not oppose this application.

Wood, J. declined to add to his former judgment, leaving the parties to settle this right *inter se*, should a case arise.

POOTOO v. VALEE UTA TAVEN & ANOR.

POOTOO v. VALEE UTA TAVEN.

PENANG.

WOOD, J.
1883.

July 11.

According to Hindoo Law, a wife's property, real and personal, is her separate property.

A Hindoo man and woman, intermarried according to Hindoo Law and custom; the wife at the time possessing some personalty, and during the coverture, acquiring realty from her relatives.

Held, the parties must be taken to have contracted on the footing of the Hindoo Law, and that both the personalty and realty were hers, subject to being taken possession of by the husband, under stress of circumstances only.

Hawal v. Dawd, *Straits Law Reports*, p. 253, followed:

The husband in such a case, acquires no interest in such property except as trustee for his wife; and for breach of his duty in that respect, he might be sued, and this Court will respect the wife's rights, although there is no marriage settlement.

The wife has such a right of action against her husband, whether she be divorced or not; and in a pauper case, is at liberty herself to sue, without the intervention of a next friend.

These were two suits in *formâ pauperis*, by a wife against her husband. The first of these suits was brought to recover \$800 the balance of \$1,000, the purchase money of certain lands formerly belonging to the plaintiff [the wife], and her brothers, and

which the husband [the defendant Valee Uta Taven] had, during the coverture, jointly, with the plaintiff's brothers and the plaintiff, sold to the other defendant [in the first suit] for that sum; or to have it declared that the plaintiff had a lien on the land for the unpaid balance of purchase money. This property had come to them by the death of their brother. The plaintiff's one-third share of this sum, *viz.*, \$333.33 had been taken by the defendant Valee Uta Taven to his own use. The second action was to recover \$200, the value of jewellery of the plaintiff, also taken possession of by the defendant, the husband, and sold, and the proceeds appropriated by him. It appeared that at the time the land was sold, the plaintiff though married, was a minor; but \$1,000 was a fair value for the land in question. The plaintiff and her husband were Hindoos, and after living peaceably for several years, eventually separated [without a divorce] in consequence of quarrels arising out of the defendant's aforesaid acts. Evidence was given of the Hindoo Law, shewing that the wife's property real or personal, was her own; but in stress of circumstances, the husband had a right to take possession of same, and deal with it as his own, without being liable to his wife therefor.

Kershaw for the plaintiff referred to *Cowel's Indian Digest*, p. 709, *Ramsawmy Padiachee v. Padiachee*, in support of the proposition, that there is no foundation in Hindoo Law, for holding that a husband had any right to property acquired by the wife during coverture.

Clutton for the defendant contended, that as regarded the land, the *lex loci*, the English Law, should govern the case, and as there had been no marriage settlement, the husband was not liable: he also contended, that even if it were otherwise, she had no right of action until divorced, and then she should have sued by a next friend and not herself—section 3, Ordinance 5 of 1878.

Wood, J. I hold as a fact, that the plaintiff was possessed of certain jewellery of the value of \$150 at the time of her marriage, which jewels the defendant has converted to his own use, without the plaintiff's consent. I also hold as a fact, that the defendant has converted to his own use, but with the consent of the plaintiff, a one-third share of the plaintiff, in the land which came to her through the death of her brother; but has not accounted for more than \$200, thereof, leaving a balance of \$133.33. I also hold as a fact, that though the woman was a minor at the time of the sale, yet this portion of her property was sold to her advantage. Lastly, I hold as a fact, that according to Hindoo Law, the jewels and the land, were the wife's separate property. On these facts, I am of opinion that the parties being Hindoos, and married under Hindoo Law or Madrassee custom and law, it must be taken to have been understood between them, as matter of agreement, that the wife's jewellery, as well as land, should be hers,—only subject to being taken possession of by the husband, under stress of circumstances, which has not arisen here—and following *Hawah v. David*, Straits Law Reports, p. 253-5, I hold, as matter of law, that the defendant never acquired, except as trustee for his wife, any interest in her property real or personal.

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The husband may therefore be sued for breach of his duty in that respect, and the Court will respect the woman's rights in such a case, although there may be no marriage settlement. As regards the other objections taken, I hold as matter of law, that the wife has this right of action against her husband whether separated from him or not; and in a pauper case, she is at liberty herself to sue her husband, without the intervention of a next friend. Properly she ought to have so sued; but this is a matter of detail and not material for the protection of the defendant against costs. There will, therefore, be judgment for the plaintiff for \$283.33, in both the actions.

KYSHE v. INCHE NAP PENDEK & ORS.

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1883.

July 11.

The defendants had obtained permission of one Sheriffa Zoharra, to build houses on certain lands belonging to her deceased father, of whose estate she afterwards became administratrix. The defendants, in pursuance of such permission, erected their houses on such land, and continued to reside there for a great many years beyond the statutory limit prescribed by the Limitation Act XIV of 1859, without paying rent for such their holdings. When applied to by the executor of one Syed Abdulrahman, who, in his lifetime was the executor of the father of the said Sheriffa Zoharra—after the statutory period aforesaid—they refused to pay rent to him; they did not then however claim the land as their own, but set up their holding under the said Sheriffa Zoharra. Sheriffa Zoharra subsequently got administration to her said deceased father's estate, and sometime thereafter, herself applied to the Ecclesiastical Court that the Letters to her might be revoked, and granted to the plaintiff: the plaintiff thus became the administrator of the estate, of the said deceased father. The said Sheriffa Zoharra, as such administratrix, [before the revocation of her letters] demanded, as such, rent of the defendants; they refused to pay her, and then, disclaimed holding under her. The plaintiff, on being appointed administrator as aforesaid, and within the statutory limit after such disclaimer, thereupon brought this ejectment against the defendants, to recover possession of the respective portions on which their houses stood. It was objected by the defendants, at the trial, that as they had been over 12 years in possession adversely to the executor of the executor of the said deceased father, and now this action being brought by the plaintiff, as the administrator of such deceased,—the plaintiff was barred by the Act of Limitation XIV of 1859, sec. I, cl. 12: it was admitted that if Sheriffa Zoharra had sued, the defendants would have been estopped from disputing her title, but, as she had not transferred her right to the plaintiff, nor sued herself, the plaintiff could not avail himself thereof.

Held, that as, if the said Sheriffa Zoharra had sued, she would, equally with the plaintiff, have been a trustee for the next-of-kin of the deceased—and the Ordinance IV of 1878, obliges the Court to deal with real and not technical rights—the objection could not be allowed, and the plaintiff was entitled to recover. On appeal, this judgment was affirmed.

The fact that Sheriffa Zoharra had not legally transferred her right to the plaintiff, or that the plaintiff was suing in his own name, was immaterial.

If there was anything in the objection, the Court would, under sections 105, 123 and 126 of Ordinance V of 1878, have allowed the plaintiff to amend the title of his suit by substituting the said Sheriffa Zoharra, as nominal plaintiff and that without terms.

Seemle. The Court of Appeal has power to allow or direct an amendment in the title of a suit.

This was an action of ejectment brought to recover possession of a piece of land on which the defendants, along with several others, had their houses. The facts in the case, and arguments of Counsel, are fully set out in the judgment. The case was heard on the 11th and 19th July and 21st August 1883.

Thomas for defendants referred to *Doe de Parker v. Gregory*, 2 Ad. & Ell. 14; *Hall v. Doe de Sartees*, 5 B. & Ald. 687; *Doe de Golclough v. Hulse*, 3 B. & C. 757; *Doe de Souther v. Hall*, 2 Dowl & Ry. 38; *Doe de Smith v. Pike*, 3 B. & Ad. 738; *Doe de Roffy v. Harrow*, 3 Ad & Ellis 68; and *Napean v. Doe*, 2 Smith L. C. p. 476 [5th ed.] and notes thereto.

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Van Someren for plaintiff, referred to *Rhadabhai v. Shama*, 4 Bom. High Court Report, Appellate cases p. 55; *Ameeran v. Che Meh*, Penang, July 1878, Court of Appeal, February 1879, [a]; *Logan v. Heoh Ah Tun*, Court of Appeal, May 1882 [b]. He contended that, if necessary, the Court would allow the plaintiff to amend, by substituting Sheriffa Zoharra as plaintiff, for the present plaintiff, and referred to Ordinance V. of 1878 sections 105, 123 and 126, and to *Long v. Crossley*, 13 L. R. Ch. Div. 388; and *Ruston v. Robin*, 49 L. J. Ch. [N. S.] 262.

Our. Adv. Vult.

September 11. *Wood, J.* In this, a suit brought by the plaintiff, as administrator of the estate of Tunku Syed Hussein, to recover from the defendants possession of four several parcels of land, by permission of the parties, and mainly to save expense by obviating the necessity of transcribing a large body of notes, should the matter come before the Supreme Court on appeal, I state the points of fact either found by me, or admitted by the parties, in order that the points of law should be more clearly developed, with a view to their discussion before me, and their subsequent discussion, if the parties require it, before the Court of Appeal.

The undisputed facts are as follows:—

Syed Sheriff Tunku Syed Hussein deceased, who died in 1823, by his Will, appointed Syed Abdulrahman and others, his executors.

By this Will he devised certain lands on which a Mosque was built for Whakoff or charitable purposes.

Syed Abdulrahman was the survivor of the executors named in the Will and has since died.

Syed Abdulrahman during his life time, and as such surviving executor, conveyed the lands devised to charitable purposes, together with three others adjoining, which comprise the land which is the subject-matter of this suit, to Whakoff or charitable purposes—but in 1879, the Supreme Court of the Straits Settlements,—in an action brought to settle the point between the executor of Syed Abdulrahman, and the administratrix *de bonis non* of Tunku Syed Hussein,—decreed that Syed Abdulrahman as such executor of Tunku Syed Hussein, had no authority to create trust estates in, among others, the lands now in dispute, or to convey the same to Whakoff or charitable purposes, and by such decision left the Will to operate upon, among others, the lands in question.

[a] *ante* p. 429.

[b] *ante* p. 514.

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For many years previous to the date of this decree or judgment of the Supreme Court, and long before the period of limitation, which period of limitation is 12 years before the commencement of this suit,—the defendants, or their predecessors in title, had erected houses on the several pieces of land in question in this action, and on its several parcel of land, and sometime about the year 1867—more than 12 years before the commencement of this action—Shaik Abdul Gunny, then executor of Syed Abdulrahman and representative of Syed Hussein, had demanded of the defendants respectively, rent for the land they occupied, which they declined to pay. Subsequently Sheriffa Zoharra, the only surviving daughter of Syed Hussein, obtained Letters of Administration *de bonis non* with the Will annexed to the estate of Syed Hussein—which were on her application revoked and the present plaintiff, the Acting Registrar of the Supreme Court, appointed administrator, &c., in her place, and at her request.

So far the parties are agreed on the facts.

On the trial before me, it was proved to my satisfaction.

1st.—As to Inche Nap Pendek, the 1st defendant, that she erected her house on the land with the permission and consent of Sheriffa Zoharra.

2nd.—As to Inche Kombe, the 2nd defendant, I find that she purchased the house she now resides in, of Syed Zeign, and subsequently by permission of Sheriffa Zoharra, resided in her house.

3rd.—As to Syed Abdullah, the 3rd defendant, I find that Syed Abdullah's father, Karim, obtained permission of Sheriffa Zoharra to live in the house now occupied by Syed Abdullah, and to whom it descended as one of the children of Karim.

4th.—As to Merican, the 4th defendant, I find that Hamid, to whom Merican was the adopted son, obtained direct permission from Sheriffa Zoharra to erect and build their present house on the land.

As to all the defendants I find, that they or their predecessors in title, so obtained permission of Sheriffa Zoharra,—who had at the time no right in law to the ownership of the property in dispute,—to build or occupy under the belief that the land was Whakoff land, and the gift of Syed Hussein, of whom Sheriffa Zoharra was the only surviving child, and that they did so in conformity with, and consistently with what I find to be Mahomedan feeling, *vis.*, that in the occupation of Whakoff land of the gift of a certain settler—the permission of the representative, or apparent representative of such settler, is a permission proper and usual to be obtained, as a thing complimentary and customary. It is a fact in the case, admitted by the parties, that about the year 1867, Shaik Abdul Gunny, then executor of the surviving executor of Syed Hussein, demanded rent of the defendants, which they refused to pay, but I find, as an additional fact, that they did so, alleging as a reason for non-payment, the permission obtained by each of them, or their predecessors in title, of Sheriffa Zoharra to build or occupy their respective houses—and not that they claimed

as having an independent right to the several parcels of land occupied by them, which fact Sheriffa Zoharra knew.

I find further, as matter of fact, that after the decision of this Court, that the lands in question were not Whakoff land, Sheriffa Zoharra who was at that time administratrix of the estate of Syed Hussein, gave notice to each of the defendants, to pay rent and attorn to her, which notice was not however complied with, but on the contrary thereof, the several defendants disclaimed, and Mr. Kyshe, the Acting Registrar of the Court, being now the administrator of the estate of Syed Hussein, brings this action, in the interests of the next-of-kin of Syed Hussein,—and upon these facts the case then came up for argument before me on points of law.

At this hearing, Mr. Van Someren relied on the general doctrine of estoppel as between lessor and lessee, or it may be, as between licensor and licensee,—and inasmuch as the four defendants, or their predecessors in title, had entered into possession under the license, or as tenants at will of Sheriffa Zoharra, and had disclaimed on her demanding rent or attornment, they had no valid defence in a suit brought by the present administrator, who represents the estate of Syed Hussein, for the recovery of the land in question—and he cited, in addition to the general authorities applicable to the law of the case, two cases tried before me, of *Ameeran, Executor, &c., v. Che Meh*, [a] and *Logan v. Heoh Ah Tan* [b].

Mr. Thomas contended, that the possession of the defendants had been for over 12 years before the commencement of the suit, adverse to the executor or administrator for the time being of the estate of Syed Hussein, and that now the action being brought by the administrator for the time being, the cause of action had in point of fact accrued more than 12 years ago, and so was barred by the Statute of Limitations. That if Sheriffa Zoharra had sued in her own right, the defendants might have been estopped from disputing her title, but she has not transferred her right, nor does she herself sue, and so the plaintiff has no case.

This latter view of the question as it appears to me is unreal and unsound. The defendants never, so far as I see, have held adversely to those representing the estate. When pressed by a certain executor, Shaik Abdul Gunny, to pay rent, they set up no title of their own; but alleged, what was in fact true, that they had held their land by the consent, and with the license, of Sheriffa Zoharra, whom they assumed to be a person justified, as being of the kin of the founder, to give them that permission, and who had assumed and been allowed to act, in conformity with Mahomedan custom in Whakoff or charity lands, as a representative of the owners in fee—and with this view of the case, it may be assumed, the executor for the time being, coincided. If Sheriffa Zoharra had been the nominal plaintiff, the defendants would have had, as it appears to me, no shadow of a defence, and the slight show of defence which this case presents, in my judgment, amounts to nothing. Sheriffa Zoharra, had she been the nominal plaintiff,

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would have been, equally with the present plaintiff, the trustee of the next-of-kin of the testator, Syed Hussein; and the Ordinance IV. of 1878,—though it may be difficult to point out with precision the exact section which would enable the Court to do so,—obliges it to deal with real, and not technical rights. In this case, I look upon the fact of any transfer by Sheriffa Zoharra of her right of action—if such it can be called—immaterial; or the fact that the administrator sues not in her name, but in his own. I should have allowed the plaintiff to have amended the title of his suit, by substituting for his own name, the name of a nominal plaintiff, Sheriffa Zoharra, and that without terms. The whole case has been tried on its merits, *vis.*, license or no license from Sheriffa Zoharra, and the exact name of the plaintiff,—who is himself a trustee for others, *vis.*, the next-of-kin,—is a matter immaterial to the real object of the suit, or the interests of the defendants.

Judgment for the plaintiff with costs.

The defendants appealed against this decision.

27th February, 1885. The appeal now came on for hearing before the Full Court of Appeal consisting of *Sidgreaves*, C. J., *Ford* and *Wood* J. J.

Ross, [Acting Solicitor-General,] [*Thomas* with him] for the appellants, contended, that in insisting on their objection to the title of the plaintiff, the defendants were not disputing the title of Sheriffa Zoharra, but the reverse. They might have been estopped from disputing her title, had she sued; but the plaintiff was a stranger to them, and they were not estopped from disputing his. There was no privity of estate between the plaintiff and Sheriffa Zoharra, as one was but an administrator who succeeded the other. *Clarke v. Grundy*, 14 East 488. Administrators were but officers of the Ordinary, and there was no devolution of interest or estate, from one to the other. The character of Sheriffa Zoharra, by virtue of which she claimed to let the defendants into possession, had been changed; and any estoppel that might have been held between the defendants and her in the former capacity, did not hold under the altered circumstance. The act of the defendants, was not a disclaimer, and their tenancy or license, was still subsisting and undetermined.

Van Someren for respondent was not called on.

Sidgreaves, C. J. This seems to me a very clear case. The Court below has found the defendants entered by permission of Sheriffa Zoharra; there was, therefore, as between them, an estate by estoppel, as between a licensor and licensee. The defendants were let in by Sheriffa Zoharra under a claim of right, but whether such claim be well founded or not is quite immaterial—it

is good as against them. Apart from her license, they had no right to be on the land, and indeed they seem to have so admitted, for when Hajee Abdul Gunny demanded rent of them, they based their right to remain on the land only on the license they had obtained from her. It makes no difference to the defendants, whether the estate held or claimed to be held by Sheriffa Zoharra, at the time she gave them permission as stated,—is an estate under different trusts from that which she afterwards held, or now holds. She gave them such permission under the idea the lands were Whakoff lands; but after the judgment of the Court in 1879, that they were not Whakoff, these lands fell into the general estate of the testator Tunku Syed Hussain. Sheriffa Zoharra was then the administratrix [with the Will annexed] of this estate, but for convenience sake, this Court thought it better, on her application, to appoint the present plaintiff, the acting Registrar then, administrator in her place. To say that this step should debar the recovery of these lands, after the defendants had disclaimed the title under which they had hitherto held, would be to frustrate the very object of the Court in granting such administration to the present plaintiff. The plaintiff here is, to all intents and purposes, but the agent of Sheriffa Zoharra, and all others interested in the general estate of the testator, then *facit per alium facit per se*. I am of opinion, therefore, the fact that Mr. Kyshe is plaintiff here, and not Sheriffa Zoharra, is quite immaterial, and the judgment of the Court below should be affirmed, and this appeal dismissed with costs.

Ford, J. I concur. The only semblance of defence on the part of the appellants is, that plaintiff is not privy in estate to Sheriffa Zoharra. He was however in truth, a trustee for her, and she was the principal beneficiary in the testator's estate. Under all the circumstances of this case, I hold there was sufficient privity of estate between them,—but if there was not, we shall give leave to the plaintiff to add Sheriffa Zoharra as a co-plaintiff, and there would be an end to the defendants' case.

Wood, J. I adhere to the opinion I expressed below. As to the objection that the defendants' act was not a disclaimer, *Jones v. Mills*, 10 Com. B. [N. S.] 788, s. c. 31 L. J. C. P. [N. S.] 66, is an authority to shew it is. I look on the defendants as very ungrateful people, who were,—as an act of kindness on the part of Sheriffa Zoharra,—let in to reside on this land, but now seek to keep possession of it as against her. I am glad to find wrong set right by the judgment of this Court.

Judgment affirmed. Appeal dismissed with costs.

NELLIGAN v. WEMYSS & ANOR.

A belief founded on the information of a credible witness, of facts imputing of guilt to another, is sufficient, reasonable and probable cause for a prosecution of such other on a criminal charge; but that must be a belief which would be entertained by a reasonable and discreet mind.

Where, therefore, the defendant, acting on the belief, as he alleged, of certain information given him by his servants—natives of the servile class, and one of whom had been previously convicted of theft [and whose information the Court

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was satisfied was entirely false] wrote to the plaintiff, threatening to prosecute him for theft, unless he returned two geese which the defendant [on the information of his servants] claimed to be his,—or producing, within a given time, evidence of their not being his [defendants'] property—and in reply, received a letter from the plaintiff, denying the truth of the information given by the servants,—claiming the geese—offering to call the man from whom he purchased the birds—and warning the defendant of the consequences of carrying out his threat, and in return stating the defendant was liable to be prosecuted for defamation, and the defendant, being irritated at this, did not wait till the time appointed, or call on the plaintiff, but went off and procured [in spite of further warnings, by the magistrate's clerk, based on the plaintiff's known character and position,] a warrant from the magistrate, on which the plaintiff was taken into custody; and thereafter charged the plaintiff before the magistrate, with being in possession of stolen property, and obtained a remand, but at the adjourned hearing, withdrew the charge without offering any evidence in support thereof.

Held, that the circumstances of the case were not such as should have actuated a reasonable and discreet mind to have acted on the information of the servants—that the case as a whole, shewed there was a want of reasonable and probable cause, and actual malice,—and the defendant was liable in damages. On Appeal this decision was affirmed.

Perryman v. Lister, 4 L. R. Eng. & Ir. Ap. 521, distinguished.

This was an action to recover \$500, damages for a malicious prosecution. The plaintiff, early during the year had purchased 4 geese—one a white pair, and the other, black and white: the black and white pair were lost the same day the plaintiff bought them, in consequence of which, the white pair were kept by the plaintiff pinned up within a low bamboo fence, by the side of his house. On the 26th March, the defendant, who also owned a pair of white geese, lost his; and on being informed by his servants that his geese were in the plaintiff's compound, that he had refused to allow them to see them though they had managed to do so by stealth, that they had no doubt the defendant's lost geese were in the plaintiff's possession, and that the plaintiff never, until then, kept any geese—the defendant believed as he alleged, this account of his three servants, and on the 27th wrote a letter to the plaintiff, threatening to prosecute him, unless he returned the geese, or produced evidence, by ten o'clock the following morning, to prove they were not his [defendants'], this letter also mentioned the servants, as the defendant's informants, and their statement to him that he [the plaintiff] had refused them to see and examine the birds. The letter concluded with a statement that he the defendant, was determined "to put a stop to this victimising of the Europeans by natives, by punishing the offenders." The plaintiff, in reply to this letter, wrote the defendant stating, that his servants were telling him lies—that they had been allowed to see and examine the birds—that the birds were in fact his own [plaintiff's], and he could call the man from whom he purchased them—that he, the plaintiff, considered the concluding part of the defendant's letter most insulting, and in his opinion, the defendant was liable to be prosecuted for defamation, for practically charging him with theft—the letter then concluded with a warning, that if the defendant persisted in carrying out his threat of a prosecution, the matter would not end there, as he [plaintiff], would hold him [the defendant], liable in damages. The defendant was very much put out on receipt of this letter, and after an interview with the

Superintendent of Police, he got his steward or butler, the defendant Francis, to lay an information charging the plaintiff with being in possession of stolen property, and praying for a search warrant for the said geese. At the time this information was being laid, the defendant was warned by the Chief Clerk to the magistrate [Mr. Leicester], who was then writing out the information, of the seriousness of the step he was taking, and the probable result of it, as the plaintiff was a man well known, and of some position, and not likely to do what he, the defendant, charged him with. The defendant simply replied he wanted his geese. The defendant got the warrant—the plaintiff's premises were entered and the geese were taken possession of by the police, and the plaintiff himself taken into custody and released on bail to appear before the magistrate on the following day. On the following day the defendant appeared, and charged the plaintiff with being in possession of stolen property: he however obtained a postponement of the case for a week. On the next day for hearing, the defendant again appeared, along with counsel, and withdrew the charge; whereupon the plaintiff was discharged, and the geese returned to him. It appeared at this trial, that the defendant's servants,—*viz.*, his butler, his waterman and syce—were all natives of the lower class, and the butler had a few years previously been convicted of theft and sentenced to two years imprisonment. This latter fact the defendant swore he was not aware of until this trial. These witnesses, among others, were called by the defendant, but had considerable difficulty in pointing out the marks by which they alleged they identified the birds. The plaintiff proved his purchase of the geese, and his possession of them from January, to the date they were taken away by the police: he also proved the marks by which the geese were identified. The plaintiff denied the tale told by the defendant's servants, and on the contrary stated, that he had allowed them to examine the birds, and they said they were unable to identify them.

Thomas for defendant contended, there was no proof of want of reasonable and probable cause—the defendant had shewn he had probable cause—he received information from his servants, who he had hitherto found faithful, and believed—they informed him how plaintiff denied having the geese, refused them inspection, and were all agreed as to the birds being actually his—that the case in fact was concluded, by *Perryman v. Lister*, 4. L.R. Eng. & Ir. Appeals, p. 521.

Van Someren for plaintiff contended, that there was no reasonable and probable cause—the case cited was distinguishable, as the facts here were quite different—the decision there was, that there had been a misdirection, the Chief Baron having, in his charge to the jury, lost sight of the interview spoken of by the witnesses. He admitted that a belief founded on information of a credible witness, of facts which imply guilt, was sufficient, reasonable, and probable cause; but that, he submitted, must be a belief which should be entertained by a reasonable and discreet mind. Here however, the facts were such that no reasonable man

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SIDGREAVES, would have acted as the defendant had done—the plaintiff's position, his reply to the defendant's letter, the unfortunate aptitude of natives of the servile class, to state what was not true, and the caution of the Magistrate's clerk [Mr. Leicester]—all shewed want of that reasonable and probable cause which ought to have operated on a reasonable mind.

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Wood, J. after observing that the question of reasonable and probable cause was a mixed question of law and fact—but was in truth a question of fact to be decided by the Judge and not a jury, as questions of the sufficiency of proof of the loss of a document, to admit secondary evidence and the like—held, as matter of fact, there was no reasonable and probable cause which ought, under the circumstances of this case, to have actuated a reasonable and discreet mind to bring the criminal charge against the plaintiff. He also held, as matter of fact, that the criminal charge was brought with actual and positive malice, and vindictively defended—and found a verdict for the plaintiff for the full damages claimed—\$500, and costs.

The defendant appealed from this decision.

2nd March, 1885. The appeal was now heard before the Full Court of Appeal consisting of *Sidgreaves*, C. J., *Ford* and *Wood*, J.J.

Thomas, for Appellant contended that the defendant had reasonable and probable cause for the prosecution, as he acted in belief, as he had stated on oath, of the information given him by his servants, who at that time he had no reason to disbelieve: that the letter he wrote the plaintiff was nothing more than what a person *bonâ fide* believing in his servants' statements, and yet vexed at the defendant's conduct, in concealing the birds, would have done. He did not wish to justify his client's remarks in the concluding portion of his letter, but submitted with all deference that they did not shew any want of reasonable and probable cause. He mainly relied on *Perryman v. Lister* [supra] and contended that, that case could not, in principle, be distinguished from the present.

Van Someren, for respondent was stopped by the Court.

Sidgreaves C. J. The case of *Perryman v. Lister* is quite distinguishable from the present. It was there held, there had been a misdirection on the part of the learned Chief Baron, in laying down a hard and fast rule, that acting on hearsay evidence alone, was evidence of a want of reasonable and probable cause. The Lord Chancellor illustrates the inconvenience of such a rule by putting a case where a person might be justified in so doing, after employing a Solicitor to enquire and obtain evidence and afterwards acting on his information. The House of Lords merely held the direction of the learned Judge was too sweeping and likely to prove inconvenient in future cases. There is really therefore no conflict between that case and this, in our holding that in the present case there was no reasonable and probable cause. The learned Judge here has found that the appellant's informants were unworthy of credit,—now who were those informants? His household servants, who no doubt were well-known to him. It is no excuse to the appellant to say he thought the

could believe them. He must have had ample opportunities of knowing them and their antecedents. If, having thus known them, he had found them men of integrity and honesty, and was himself honestly guided by their information, he might have been justified. The case would then resemble the case of *Perryman v. Lister*,—but here at the outset we find his principal informant, the butler, was himself a convicted thief,—and the information given the appellant is entirely that of this butler and his staff. According to this man's own admission, there had been an altercation between him and the respondent, a few months before, about the loss of some geese belonging to the respondent. Suspicion strongly attaches to this very servant and the appellant should have hesitated before he acted. He knew who the respondent was, he ought to have considered his character and position, to see if it was a likely story that the servants had brought. He ought to have gone and enquired of the respondent: that would have been the conduct of an honest man in search of truth. Instead of that, he writes the defendant a most improper letter, most threatening in its tone and insulting in its language. The reply he gets is just what an honest yet indignant man would have given; it denies, in the most indignant terms, the charge which the appellant had made, and points out the falsehood of the very servants, the defendant says he received his information from, and concludes by threatening proceedings should the appellant act on their information. The appellant takes no notice of this letter. He evidently gets annoyed at it, and goes straight away and applies for a search warrant. The effect of such a step the appellant perfectly knew; but he persisted in it. What was the necessity for a warrant, why not have applied only for a summons? To say there was no evidence of a want of reasonable and probable cause under the circumstances, is to outrage the sense of this Court. In my opinion there was abundant evidence in the Court below to shew the appellant acted not only, without reasonable and probable cause, but also vindictively and maliciously—for which he well deserves to pay. The judgment of the Court below, in my opinion, should be affirmed, and this appeal dismissed with costs.

Ford J. I entirely concur in the language and judgment of the learned Chief-Justice.

Wood J. So do I.

Appeal Dismissed [a]

KHOO SEOK HAING v. KHOO WEE TEAM & ANOR.

PENANG

Where there is a devise of property, coupled with a restraint against alienation, the restraint alone is void, and not the whole devise.

A testator who died prior to 1837, devised a house and monies to his daughters as follows: "I give and hand over to my daughters, the house, &c., to live in "together, it shall never be either mortgaged or sold, I give and "hand over also to each of my daughters, a sum of \$30. I trust the furniture in

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[a] See *Cheah Oon Heap v. Choak Kong What*, 18th July 1877, ante p. 393.

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"the said house, to my youngest daughter until they all are married, when it shall be equally divided among them. My sons or other relations will not interfere in this arrangement." By a subsequent part of the Will, he provided for his sons, and gave the residue of his estate, real and personal, to them.

Held, that although the question was raised subsequent to the Wills Act XXV of 1834, the rules of construction prior thereto must be the rules governing the construction of the testator's Will, and that the daughters therefore only took a joint estate for life, in the house.

Suit to have it declared that the plaintiff was entitled in fee to a certain house in Penang, under the Will of one Khoo Chaing, deceased: the clauses of the Will material to the question decided herein, being as follows: "The tiled covered house I have built in Toh Aka's Lane, I give and hand over to my daughters Loo Eng, Seok Haing and Hoon Haing to live in together. This house shall never be either mortgaged or sold, nor shall the ancestors' incense burnt therein, [the genii of their ancestors] be removed therefrom. I give and hand over also to each of my daughters a sum of \$30. As regards the house furniture, I trust it to the care of my youngest daughter Hoon Haing until all three are married, when this furniture shall be divided in equal share among my three daughters. My sons or other relations will not interfere in this arrangement." The residuary clause, devised the residue of the testator's estate, real and personal, to his son and eldest grandson. The Will was made on the 3rd day of December, 1834: the testator died on the following day. The question in the suit was whether the daughters took an estate in fee, or only one for life. The plaintiff was one of such daughters.

Thomas for the defendants contended, that the whole clause being in restraint of alienation, was void. *Ong Cheng Neoh v. Yeap Cheah Neoh*, Straits Law Reports, 314 [a]; that the devise, if not wholly void, conferred on the daughters only an estate for life; the term "to live in together," shewed that it was to be personal to the daughters.

Van Someren for plaintiff contended, that the clause was not wholly void but only that portion which restrained alienation. *Kader Bee & anor. v. Kader Mustan & ors.* [b], *Fatimah v. Logan*, Straits Law Reports, 288, 296 [c].

[Wood, J. intimated to Counsel that he need not further dwell upon this point.]

Van Someren in continuation, then contended, that the clause in question conferred on the daughters an estate in fee; that the Will might be divided into three parts, carrying out three distinct objects, 1st in providing for the daughters, 2nd in providing for the sons, and 3rd in providing the carrying out of the directions of a third party, to whose estate the testator was executor; that he left both sons and daughters definite property; that the words "give and hand over," were used both in respect of the house, as well as to the legacy of \$30, and the latter certainly was for an absolute interest. The presumption therefore was, that he intended the daughters to take the like interest in the house. *Doe d. Brodie v. Roberts*, 11 Ad. & Ell. 1,000; *Fenny v. Eustace*,

4 M. & S. 58; *Doe d. Knowl v. Lawton*, 4 Bing. N. C. 455; that the words in restraint of alienation, though void, were of importance as shewing the testator's intention to keep the property within the family circle, and his giving the property to the three daughters, and alluding to their marriage, also pointed to the same conclusion, *Doe d. Wood v. Wood*, 1 B. & Ald, 518; the concluding words of the clause shewed that the sons were not to have an interest in the house, and the leaning of the Courts at the present day, even in cases as the present, of Wills executed prior to the Wills Act, was against a life estate, and unless the words were clear, would consider an absolute interest to be the one intended, *per* Martin B. in *Manning v. Taylor*, 1 L. R. Ex. 235, 239.

Thomas in reply.

Wood, J. This Will was made prior to 1837, and therefore before the Wills Act. The rules of construction were stricter then, than they are now. The same rule of construction must be followed at the present day in constructing Wills executed prior to that Act, and unless there are expressions in the Will shewing a larger interest was intended to be conferred, a mere gift or devise of land to a person, without more, confers on him only an interest for life. In the present Will the intention of the testator appears to have been the living together of the daughters in the house, and therefore to be personal to them. I can find no expressions enlargening the estate to one in fee; and think on the construction of the Will, in accordance with the Rules before alluded to, I am bound to hold, that the daughters took only a joint estate for life. Whether this estate for life is determinable on the death of any one of the daughters, or all of them, it is not necessary for me now to give a decision. The clause being somewhat ambiguously worded, and this litigation occasioned through the neglect of the testator clearly to express his intentions, I think the cost of both parties to this suit, should come out of the estate.

Order accordingly.

HASHIM NINA MERICAN *v.* KHATIJAH BEE & ORS.

The Court stayed an action in ejectment, on the ground that a suit in Equity was pending,—in which the same point was in question and in which suit a decree for accounts had been made—until the finding and report on such account—but ordered the defendant to give the plaintiff, security for payment of the rent of the property, [the subject of the ejectment,] accruing during the pendency of such suit in Equity.

This was an action of ejectment of certain lands and premises known as No. 1, Carnarvon Street, purchased by the plaintiff of one Yayah Merican, the administrator of the estate and effects of one Dalbadalsah, deceased. The defendants in their statement of defence alleged, among other things, that the said Yayah Merican, in consideration of administration being granted to him,

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promised to buy in the said premises for the defendants. That thereafter he bought in the same for the defendants, for the sum of \$6,000. and thereafter filed his accounts showing the defendant Khatijah Bee's share in the estate of the deceased, fell short of that sum on which account he claimed to be paid, for the benefit of the estate, the difference between the amount of the said defendant's share as shown by him, and the purchase money aforesaid. That the defendants insisted that the said Yayah Merican had not fully and faithfully accounted for the estate of the deceased—that if he had so done, the said defendant's share would be more than sufficient to cover such purchase money, but the said Yayah Merican of his own wrong, alleging that as the said defendants had not paid the balance of the purchase money after deducting her share—re-sold the said premises to the plaintiff, who was his son and purchased with full knowledge of these facts. That the defendants prior to this action commenced an action in this Court against the said Yayah Merican as such administrator, praying for an account to be taken of the estate of the deceased and for payment of their shares, in which suit a decree, by consent, had been made, referring the matter to the Registrar to take the accounts. The said Yayah Merican was made defendant to this action by counterclaim; issue was joined on this defence, and defence put in to the counterclaim. On the case being now called on for hearing, and the pleadings read,

Ross, for the defendants, moved that the proceedings in this action, should be stayed until the reference to the Registrar mentioned above, should be reported on. He stated the accounts were incorrect, but gave no instances in support of the statement.

Van Someren stated that the accounts of Yayah Merican were correct and true; and further that a stay of proceedings would not be ordered merely because another suit, relating more or less to the same subject-matter, was pending in Chancery. He referred to *Pierce v. Robins*, 26 L. J. Ex. [N. S.] 183, and sub-section 5, section 1 of Ordinance IV. of 1878; he also drew attention to the fact, that the conditions of sale, under which the property was purchased for the said defendant, provided a re-sale, in case of default of payment of the purchase money.

Wood, J. considered that whether the said Yayah Merican had a right to sell or not, depended on the correctness or incorrectness of his accounts. As those accounts were called in question, and were now the subject of inquiry by the Registrar, the proceedings in this case should be stayed, pending the finding and report of the Registrar—and that the conditions of sale, referred to, had no bearing on a case like the present, which was not a sale among strangers, but a family arrangement.

Van Someren then pointed out, that during the pendency of the enquiry of the accounts, which would take several months at the least, the rent of the premises would be lost to his client the plaintiff.

Wood, J. ordered that security should be given by the defendants, in the meanwhile, for the ultimate payment of the rent of the premises, at the rate of \$20 per month—such security to be in

the sum of \$500, conditional as to payment, at the rate of \$20 per month.

WOOD, J.
1883.

Proceedings stayed (a)

HASHIM NINA
MERICAN
v.
KHATIJAH
BEE & ORS.

SYED MAHOMED ALSAGOFF v. MAX BEHR.

Whether a tenant, who holds for a term of years, and after the expiration of the lease continues to do so, paying rent for his holding, is a tenant from year to year or otherwise, is a question of fact to be gathered from the circumstances; but ought to be such a tenant as is just and fair between the parties.

The leaning of authorities is however in favor of the presumption of the tenancy being from year to year; and the reason for this, is founded mainly on common sense and justice.

Neither the practice in this Colony to let from month to month,—nor the fact that by the former lease, rent is reserved not by the year, but by the month,—rebuts the presumption.

SINGAPORE.

FORD, J.
1883.

August 24.

This was an action of ejectment, and the facts and questions arising thereon were set forth in the form of a special case.

Donaldson, for plaintiff.

Joaquim, for defendant.

Cur. Adv. Vult.

August 28. *Ford, J.* In this case in which Mr. Donaldson appeared for the plaintiff and Mr. Joaquim for the defendant, the facts [which have been stated in the form of a special case] are simple enough.

The plaintiff granted a lease of the premises known as Beach House for a term of years at a certain rent payable monthly, and after the expiration of the term the defendant held over, continuing to pay the monthly rent for two months. The question is as to the tenancy which was thus created, whether it was yearly or monthly. I have carefully looked through all the cases and I do not find any rule of law laid down, that because a tenant holds over, he does so as yearly tenant. The question seems to have been one of fact to be gathered from circumstances, and the tenancy arising on holding over, should be one that is just and fair between the parties. The cases, however, show a strong leaning amounting to what is called a presumption in favor of an annual tenancy, and the reason is founded mainly on common sense and justice.

The presumption has been held to apply to all classes of property, although it had its origin in agricultural leases.

In the cases *Doe de Martin v. Watts*, [7 T. R. 83.] Lord Kenyon said:—

"I admit all the cases that have been cited, except the last at *Nisi Prius*; they only prove, what indeed is admitted by the counsel for the plaintiff in this case, that a lease made by a tenant for life, which is void in its creation, cannot be confirmed by the reversioner; but they do not shew that when such a lease is abandoned, another relation may not subsist between land-

(a) See *Kyph 467*

FOOD, J.
1883.
—
SYED MAMU-
NUD ALAA-
GOFF
v.
MAI BHER.

lord and tenant by the one paying and the other receiving rent. Here one of the lessors of the plaintiff received rent by his steward so nomine, as rent; if the defendant had been a trespasser, no rent could have become due, it could only be paid as rent under the idea that the defendant was a tenant; and if he were a tenant the plaintiff cannot recover, not having given him notice to quit. It would be extremely unjust that a tenant who occupies the land should, after he has sown it, be turned out of possession by an ejectment, without any notice. And it was in order to avoid so unjust a measure, that so long ago as the time of the Year Books, it was held that a general occupation was an occupation from year to year and that the tenant could not be turned out of possession without reasonable notice to quit. That rule has always prevailed since, and in times certainly as enlightened as those we ought not to depart from a rule which was as wisely and justly settled."

The cases all go to shew 6 months is "reasonable notice." Here, we have the fact of a holding over and payment of rent, and the clear presumption is that he holds on as annual tenant. The question is, has he shewn any facts to rebut that presumption?

The defendant first relies on a custom prevalent here to let by the month. I am unable to see how that bears on the case; it is rather a practice than a custom; persons usually hire by the month, and I fail to see how it applies to the case of a man who takes a house for a number of years and holds over.

A further circumstance is relied on that there is no reservation of rent by the year in the lease, but that it is payable by the month. This is relied on as shewing an intention to create a monthly tenancy after the expiration of the term.

I am unable to come to the conclusion that the omission to reserve the rent annually, rebuts the presumption. Certainly there is a case [*Richardson v. Lanpedge*, 4 Taunton, 128] in which it was laid down that "a mere general letting is a letting at will, "but if the lessor accepts yearly rent, or rent measured by any "aliquot part of a year, the Courts have said that it is evidence of "a taking for a year," but a month of course would be an aliquot part of a year as well as 3 or 6 months. I do not think this is sufficient to rebut the presumption.

Then if I go on to the question of justice and convenience, in the case of this house, an hotel, it certainly is convenient that the tenant should have a longer notice than one month to turn out, and so, if the landlord, also of an intention to give up. Under these circumstances I hold the tenancy, to be a yearly tenancy, but the notice given in January, must be considered good notice for the termination of the current year. The costs will follow the event.

VELLIAN v. KADAPAH CHETTY & ANOR.

PENANG.
—
WOOD, J.
1883.
—
September 3.

Where the Registrar has definitely dealt with matters of account referred to him, and made findings thereon, the Court will not readily disallow such report, on the assertion—or even on the admission of the parties, and proof—that any one or a few particular items in such report, are unsupported by proofs to be found on his notes of evidence, and is at variance with the story told by both parties.

Therefore, where both parties were agreed, that a particular promissory note was given in settlement of accounts, and the only question between them was the settle-

ment of that account—but the Registrar disbelieving both these statements, found that the note was given for actual advances by the one party to the other.

Held, the report should not be disturbed, and the exceptions filed thereto on that ground, were overruled.

Exceptions to Registrar's Report. The suit was brought for mortgagee's accounts. It appeared that the defendants had received some money from plaintiff on deposit, and had drawn Bills in his favor, at his request, on Madras; that they also held Bills of Sale by way of mortgage on certain personal property of the plaintiff, which property they had sold, and also held a promissory note from the plaintiff for \$158. The Plaintiff admitted this note. The defendants alleged that the plaintiff had gone into all the accounts, and the aforesaid \$158 being found to be due them, the plaintiff gave them this note to secure same. The plaintiff denied the note was given to secure the balance due on account of all the transactions, but only a portion of their dealings. The acting Registrar, Mr. Kyshe, before whom the case was heard, disbelieved both these stories and was of opinion that the \$158 was for further advances made to the plaintiff by the defendants, and on the whole found the defendants indebted to the plaintiff in a sum of \$54 odd. The plaintiff excepted to this report.

Clutton, for plaintiff contended that on the facts as found, some of the Registrar's inferences were incorrect and the method of his dealing with the accounts was also incorrect—in particular in his finding that the promissory note for \$158 was given for money advanced, when neither party alleged such was the case. In fact, by so doing, the Registrar was charging this item twice over, and consequently found so small a balance due to the plaintiff.

Anthony, for defendants in answer to a question from the Court, admitted that they did not claim the promissory note to be for further advances—but was not otherwise called on.

Wood, J. I am of opinion, on reading this report of the Registrar, in which I find that the matters submitted to him have been definitely dealt with, and findings made by him on each item—that the Court will not readily disallow any particular item, on the assertion—or even on admission and proof—that any one or a few particular items are unsupported by proofs to be found on his notes of evidence. Much allowance is to be made to the Registrar in his finding of facts, from manner and demeanour of witnesses, and the ways of keeping accounts, books, and so forth—and disproof of any particular item is not to be held sufficient ground for objection to his report on an account, when he may be held to have carefully considered all the evidence adduced, and made his report on the state of accounts between the parties litigant. The exceptions will therefore be overruled and the report confirmed. The plaintiff will have a verdict for the amount found due him by the report, together with the general costs of the cause, as for a small cause: the defendants' costs of these exceptions, must however be paid by the plaintiff.

WOOD, J.
1883.

VELLIAN
v.
KADAPAH
CHETTY &
ANOR.

Report confirmed.

NOORSAH BAWASAH MERICAN v. WILLIAM HALL & CO.

PENANG
 —
 WOOD, J.
 1883.
 —
 October 11.

Where by a Bill of lading it is provided, that "if necessary the goods are to be landed by the master or agent of the ship, at the risk and expense of the owners of the goods," and the necessity has arisen in the form of quick despatch being requisite to the ship, which may also be beneficial to the owners of the goods—the landing of such goods by a third party, with whom the owners of the goods have no special contract is to be construed as the landing by the master or agent of the ship, and the expenses of such landing, can only be received by the agents or master from the owners of the goods, and not from them by the lightermen.

The fact that the owners of the goods have on previous occasions paid the lighterman direct, on Bill by which they are declared to be debtors to him, does not conclude them from afterwards disputing that liability to him, for subsequent lighterage.

This was an action for lighterage. The facts appear in the judgment.

Thomas for plaintiff.

Ross for defendants.

Our. Adv. Vult:

October 30. *Wood, J.* In this case, the plaintiff Noorsah Bawasah Merican, a lighterman, sues the defendants, merchants, in Penang, for \$123.27 for work done as a lighterman and wharfinger in the months of January, February, and March 1883, in landing defendants' goods from Holt's Ocean Line of Steamers in the Port of Penang and for warehousing such goods and watching before delivery.

William Hall & Co., the defendants are the consignees of certain goods by Holt's Ocean Line of Steamships, under Bills of Lading. These Bills of Lading are much in the usual form, and, with some slight variation, the same in all material particulars in the case of each of the various consignments in respect of which the plaintiff claims.

The following clauses which are material to the consideration of the present case are nearly the same in all:

"The goods to be discharged from the ship as soon as she is ready to
 "unload at wharf, into hulk, Lazaretto or lighters, and if necessary to be
 "landed by the master or agent at the risk and expense of the owners of the
 "goods. . . ."

"The master or agent shall have a lien on the goods for payment made
 "or liabilities incurred in respect of any charges stipulated herein to be
 "borne by the owner of the goods."

It is said above that the above clauses are nearly the same because in one or two cases the words "and expense" are omitted and the clause reads:

"To be landed by the master or agent at the risk of the owners of the goods."

This variation, however, is immaterial as it was conceded by the defendants that they hold themselves liable to pay some one for the lighterage. And it may further be remarked that the Port of Penang being an open roadstead there is properly no unloading at any wharf, and it is accordingly conceded that these words "at wharf" may be deemed to be omitted.

Holt's Ocean Line of Steamers is a line of Steamers doing a large business and touching only at Penang on their way to China, bringing consignments of varied kinds of goods consigned to numerous and different consignees at Penang. Under such cases quickness of despatch from Penang is a matter important to the interests of the owner of the Steamers, and convenient in a general way to the consignees of goods, and it may be looked upon as a matter of fact in the case, that it is "necessary" within the meaning of the above clause that to save time, trouble, expense, damage and possible loss, goods should be landed by one lighterman with an efficient staff, and a good supply of boats at the public wharf and ware-house—where the goods taken from alongside and unsorted are ultimately sorted and ready for delivery to the different consignees.

Such has accordingly been done for several years and on the application of Bawasah Merican permission was given him, and the sole monopoly and privilege accorded by Messrs. Mansfield, Bogaardt & Co., then and now the agents of Holt's Steamers, to attend alongside with his boats and lighter the entire cargo of each ship that arrived. This was accordingly done and the rule and practice rarely departed from and then only in the case of special bulky goods, presumably machinery, which by understanding with the agent were landed by the consignees themselves in their own boats.

In this course matters proceeded, the defendants Messrs. William Hall & Co., with others receiving their goods through Bawasah Merican, the plaintiff paying the charges made out in accounts rendered by him to them in which they were debited to him by name.

Lately, but before the performance of the work and labour in respect of which this action was brought, a question arose among the mercantile community as to the responsibility of the ship-owners for loss which might be incurred by the act of Bawasah Merican, and accordingly in October, 1882, the following circular was sent by Messrs. Mansfield, Bogaardt & Co., Holt's Agents at Penang, to the principal mercantile firms there and among them to Messrs. Hall & Co.

"Consignees by the Ocean Steam Ship Company's Steamers are hereby informed that Bawasah Merican is not and never has been a servant of the Ocean Steam Ship Company or in the employ of our firm for receiving and delivering goods at this Port."

"He is allowed on board with his staff to assist ship in getting quick despatch and consignees in obtaining quicker delivery than they could do by sending their own boats alongside."

"It is hereby distinctly conveyed to all concerned that neither on behalf of the Ocean Steam Ship Company nor ourselves do we admit any responsibility whatever for his acts or negligence after the cargo leaves the ship's side. If consignees and others interested in landing cargo from our Steamers desire to appoint a more competent man than the said Bawasah Merican to act for them, we shall be glad to give him all the assistance we can in facilitating the clearance of goods from Steamer and Jetty."

WOOD, J.
1883.

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"The next steamer to arrive will be *Patroclus* about 14th instant, and failing united action as suggested above on the part of consignees the said Bawasah Merican will be allowed to receive the cargo as hitherto."

P. P. MANSFIELD, BOGAARDT & Co.,

(Sd.) GEORGE E. TURNER,
Agents Ocean Steamship Company.

This circular was returned with Messrs. William, Hall & Co's., remarks as follows:

"The O. S. S. Co., must either take the risk of landing the cargo themselves or allow consignees to do so themselves from ship's side on terms of Bill of Lading. We shall recognize no irresponsible intermediate party between the O. S. S. and ourselves."

P. P. S. B. & Co., J. G.
Do. Do. WILLIAM HALL & Co.

The defendants thereby as I understand, adopting the reply of S. B. & Co. [Sandilands, Buttery & Co.],—somewhat similar remarks were made by other firms to which it is not material to refer.

To this Messrs. Mansfield, Bogaardt & Co., reply as follows:

"With reference to the notice issued by us this morning re landing of cargo, we wish to point out to those who have endorsed it adversely that we are quite within our rights according to the B. L. on which the cargo is carried as per clauses marked in red herewith. We shall be quite prepared therefore to carry out the terms and conditions of the said Bills of Lading until a test case has established the disputed points."

P. P. MANSFIELD, BOGAARDT & Co.

(Sd.) GEORGE E. TURNER."

A Bill of Lading accompanied this last circular, which is the usual Bill of Lading, but one of the clauses *marked in red* is a clause to the effect that the goods are to be delivered "from the ships' deck where the ships' responsibility shall cease."

As to which it may be shortly said that this Bill of Lading though doubtless used in some other cases was not used in the case of the goods, the lightering of which is charged for by the present plaintiff.

The other clause marked in red is as follows, being the clause above adverted to with an additional one, not material to the present inquiry:

"The goods to be discharged from the ship, as soon as she is ready to unload, into bulk, lazaretto or hired lighters, and to be landed, and [if necessary] stored by the master or agent at the risk and expense of the owners of the goods. If prevented from discharging by weather, the goods may be taken on to the next convenient port for transhipment to their destination."

Subsequently the goods, the lightering of which is now charged for, arrived by various ships of Holt's Co., and lightered by the plaintiff Bawasah Merican in the months of January, February and March last, and accounts for them handed to defendants in all of which the sums charged are credited to Bawasah Merican the plaintiff by name.

The defendants, however, desirous of raising the point declined to pay plaintiff except on accounts in which they were made debtors to Messrs. Mansfield, Bogaardt & Co., who they contended, were their real creditors and whose discharge they required.

This was not done and hence the action.

At the trial Mr. G. E. Turner, Manager of the firm of Mansfield, Bogaardt & Co., and the plaintiff Bawasah, were the only witnesses called on the part of the plaintiffs, none being called for the defendants.

Mr. Turner stated on taking over the management of the business some time before October in last year, he issued the circular of October 7th, 1882.

"Because he had reason to believe there was a misunderstanding as to the position of the plaintiff Bawasah Merican with respect to the Ocean Steamship Co. The merchants seemed to think that Bawasah Merican was a regularly employed servant to the firm and I wished to undeceive them. Bawasah was in no sense of the word our servant nor was he employed by us, we did not pay him in any shape or form. He had no place in our office nor was he subject to our orders. He was an outsider, and Government contractor at the same time, and any other person would have done as well for us."

"When a ship came into port he was alongside with his boats, anybody else might have done the same if he brought boats enough to discharge the ship without delay."

"He was paid by the consignees. After the issue of the circular plaintiff went to receive cargo alongside, and I presume he was paid by the consignees. I should certainly not receive the money. He never comes into our office, we never see his accounts."

Cross-examined:—

"When I came to Penang I found plaintiff doing this work. I never made any contract with him—when ships arrived no notice was sent by our firm to plaintiff, he might come to enquire as others do. It is no business of ours who is to take off the goods. The captain enquires of the agent, I should certainly tell him to deliver to Bawasah. Supposing a package was lost between the ship and the Jetty by default of plaintiff, the loss would fall on him. My reply to any such question would be, 'settle the matter with Bawasah.' It may be that a question of responsibility was involved. The consignees objected to Bawasah."

By the Court:

"I took Bawasah Merican as I found him, the person usually employed to lighter goods; he was sanctioned and privileged to go on board a ship of Holt's Line, without specially asking for permission. It is always advisable that a single lighterman should be employed; it would be necessary for the better delivery of the goods; no small man could do it and with a man with the resources of Bawasah Merican, it was an advantage to the ship. Always since I have been here the discharge has been so effected by means of one man, and I should say that with a Liverpool cargo no more than two men could be employed; with a London, only one man."

"Any more than this would be inconvenient."

"In the interest of the ship I should consider it necessary to restrict the lightering part of the work to be in the hand of one man, or at the most two, with a large staff of men and many boats."

"Bawasah had in his employment usually a good staff of men and many boats, and it was for this reason that he was so allowed to come on board."

"It was quite as much in the interest of the consignees that this system should be pursued."

"The goods would not have been so knocked about nor late in delivery or the same chance of loss or confusion of packages."

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"I did nothing to bind the consignees to employ the man Bawasah, I gave them by my notice permission to employ any one else, so long as they employed one or two men only. There are other men who might have been employed by the consignees."

Further evidence was given by Mr. Turner with respect to a bye-gone case in which Messrs. Katz Brothers were concerned, which I look upon as irrelevant to the present case except as showing what is not denied, that the mercantile community at Penang looked upon the plaintiff as the servant of the agents of the ship and that they held the latter, as such agents, responsible for the negligent conveyance of goods from ship to shore.

"Bawasah Merican the plaintiff: I commenced my connection for landing goods for Messrs. Holt's Steamers some time ago. At first every one went to apply to Mr. Bogaardt for work, the work of landing goods as lighter-man, and I was one among them."

"I was taken on. I was engaged by Mr. Bogaardt and instructed what I was to do. Mr. Bogaardt said that as soon as a vessel came into port I was to be in readiness with as many boats as might be necessary."

"I was to take these boats alongside of the ship and unload the goods."

"The bill of lading would be sent on board with 'please deliver' on it, and I was to deliver the goods accordingly. I always paid the boatman myself and the wharfage also. I made out my bills to the consignees and would be paid by them. I always did this. I took the bill of lading. The goods I used to unload and 2 or 3 days after the bill of lading would come with 'please deliver' and so I delivered them. I have been invariably paid by the consignees. I have never been paid in any shape or way by Mr. Bogaardt. I have always invariably made out bill for charges in this form 'the consignees Dr. to myself, Bawasah Merican.'"

"I have settled claims for damages, which were incurred through me or my men. I am liable for damages done, so I consider."

"In the case of Hall & Co., a charge of chafage was made against me. I was spoken to by Mr. Tennant myself, as to how it was caused, I said I did not know how it happened. Mr. Tennant and Mr. Turner surveyed and said it was my fault and I paid it. The amount was paid when my bill was paid; it was then cut off. These bills were signed by William Hall & Co., after their decision of Katz's case. They bear date in May 23, 19, 22, 21, 17. Where Mr. Padday has signed 'please pay' I consider it money in hand. This, is an account of the different bills paid by Hall & Co., with dates of payment."

Cross examined:—

When Mr. Tennant made the complaint he may have gone to Mr. Turner first. Mr. Turner and Mr. Tennant were at the Jetty and I spoke to the two because William Hall & Co., refused by their Krani to receive the goods. I spoke after he had refused to receive them, a few days afterwards. I donot know if the claim was made against Mr. Turner.

With Mr. Bogaardt the arrangement was thus:

"I spoke myself, I said if you allow me to do the business, I will supply the required boats, unload the goods, deliver them to the different parties and receive the money for them. The captain when I went alongside was spoken to by Mr. Power as I believe. He was shipping clerk, this was on the first occasion. On the second occasion the same, and so with all until I became known. I had no standing letter to the captain. I believe Mr. Power must have pointed me out also. I never met with any difficulty. I went to the chief-officer after saluting the captain. Mr. Bogaardt's people would be on board before me, and I never had any trouble. I was the only person so employed, myself and my assistant. I understood from Mr. Bogaardt that I was the only person to be employed. There was a distinct understanding between me and Mr. Bogaardt that for his Company I was to be the only lighter-man, I was to bear profit and loss. As to losses Mr. Bogaardt said nothing."

By the Court:

"The charges I am suing for were incurred in January, February and March. Before this I know there was a question as to by whom I was em-

ployed. I knew that the consignees of goods objected to my being considered as employed by them."

"I did not know when I saw Mr. Bogaardt that Messrs. Bogaardt landed the goods themselves, I went there because I knew the goods had to be landed. I went to Bogaardt because I knew that they had the privilege of landing the goods and therefore I went to them. I knew they would allow the consignees to land the goods themselves."

"In exceptional cases of heavy packages special permission had to be given. The consignees might land goods themselves, but I knew it was not the custom."

"I have never been spoken to by special consignees. Messrs. Hall & Co., have often spoken about the goods, I cannot read English—but very little. I might read a little. I did not read the Bills of Lading in this case. Before this action was commenced I did know that Messrs. Hall & Co., were willing to pay Bogaardt & Co."

"In certain whiskey on 31st May I remember a notice being sent by Mr. Ross claiming demand of 140 cases whiskey. I remember this notice being sent."

Such are the facts of the case, and it may be observed that the matter of the suit has lost its interest as a test case, it having been formally intimated on the part of Holt's Co., to the community at Penang, that "merchandize from ship to Jetty is conveyed by Messrs. Mansfield, Bogaardt & Co., as agents of the Ocean Steam Ship Co., in the terms and conditions of the Company's Bill of Lading now in force, and not by Bawasah Merican as hitherto."

This concession being made as Mr. Turner states in deference to the general requirement though by no means in his opinion in conformity with the rights of the case.

Mr. Thomas for the plaintiff contended, that the plaintiff, who is no party to the Bill of Lading and not cognizant of its contents, has done work and labour for the defendants as their lighterman; they have accepted his services and have heretofore paid him under Bills in which he has been made their creditor for the work done, and have demanded and received from him the amount due for damage done in the course of the transit of goods conveyed by him from ship to shore, and they have done this after notice from the agents of the ship that they are not liable. It may be contended that the owners of the ship are not bound to find means of transit from ship to shore even in case of "necessity" arising within the meaning of the Bills of Lading, and in this case the understanding between the owners of the ship and the plaintiff is no contract, but simply a permission or privilege acceded him which bears with it none of the elements of contract. There is no obligation in the owners of the ship to pay the plaintiff, and it may be doubted if the agents or owners could sue Bawasah, the plaintiff, for breach of his engagements to send his boats alongside.

Even supposing that the owners of the ship are bound to send the consignees' goods on shore in case of necessity, yet still the contract is between the plaintiff and the defendants, the plaintiff to lighter the goods and the defendants to pay for them.

Mr. Ross for the defendants contended that the Bills of Lading are the crucial point in the matter, and under the terms con-

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& Co.

tained in them, if necessity arise, as to which there is no doubt in this case, the owners by their agent have the duty cast upon them of lightering from ship to shore and the privilege of so doing to save time for the ship. Under these circumstances the understanding entered into between the agents of the ship, Messrs. Mansfield, Bogaardt & Co., is a contract under which in consideration of the privilege and monopoly conceded to him by the agents, the plaintiff Bawasah undertakes to lighter. The person to whom he looks for payment is immaterial. The contract in this aspect of the case is on the same footing as the contract of the master of a restaurant with his servants who waits upon his guests. He may receive no wages from the master, and even pay for his situation as waiter, but he looks for his payment in the gratuities given by the customers and guests of his master.

The circumstances of the Bills being made out in Bawasah's name and the amount paid by the defendants under such form of claim, and the compensation received from plaintiff by defendants direct, does not conclude the defendants. At the time of the work done by the plaintiff it was well known by both parties, plaintiff and defendants, that the defendants contended that the plaintiff was not their agent, and the settlement of these two matters of account for the freight, and compensation for damage done by the plaintiff, are explained by the fact that such a settlement is direct and saves circuity of action between the three parties, plaintiff, defendants and the owners of the ship.

That the owners are bound to lighter is, as before pressed, the main point in the case, and this is clear from the terms of the Bills of Lading. "If necessary the goods are to be landed by the master or agent at the risk and expense of the owners of the goods".....and the provision "that the master or agent shall have a lien on the goods for payments made or liabilities incurred in respect of any charges stipulated to be borne by the owner of the goods" fully supports this view.

In this case I took time to consider my judgment, not from any material doubt which I entertained, but with a view to give a written decision on a matter which had been already the subject of previous litigation, and on which a strong opinion one way or another had been entertained by the mercantile community, and with this view, and to give a clear exposition of the point in question, I have given the evidence at length.

The matter seems to me to involve no difficulty of law or fact.

It is to my mind clear that by the terms of the Bills of Lading under which the goods were consigned in this case, the duty of lightering from ship to shore is thrown upon the agent or master whenever "necessary" and it is conceded that this necessity has arisen and that the arrangement made by the agent on his first entering upon the task of lightering the ship was a contract entered into between the agents on the one hand and the plaintiff on the other, in the joint interests of both, that the agents might carry out the duty imposed upon them by the Bills of Lading, and the plaintiff enter upon a profitable branch of business.

The defendants have all along maintained the position that this duty is thrown upon the owners and their agents, and have refused to recognize the plaintiff as their agent or the person between whom and them there exists any privity of contract. And I am of opinion that the payments of his Bills on his receipt and on firms in which they are designated as debtors to him, and the payment by him of damage caused by his act at their request, are acts done for convenience of settlement, and are formal rather than real, not causing to the plaintiff any inconvenience or misleading him in any way, he being at the time well aware of the contention of the defendants that they regarded him as the agents of the owners and not of themselves, and thus their acts do not conclude or stop them from contesting this suit.

I remark that the claim in the action is made for the work and labour not only in lightering from ship to shore, but in warehousing and watching. The Bills of Lading under which the goods for work and labour connected with which this action is brought, speak of "landing" only. But no point was made at the trial as to watching and warehousing as distinct from lightering from ship to shore and I notice that the Bills of Lading referred to in Mr. Turner's second circular is in this particular slightly different in form from that under which their goods were conveyed.

The lightering in fact from ship to shore has been the only point contested in this suit, and any charge for watching and warehousing, as distinct from lightering, has not been distinguished from it, and I take it for granted that it is conceded that the storage and watching are part of the lightering, and I accordingly find for the defendants with costs.

KHOO YAH HONG v. KHAY THYE & ANOR.

The plaintiff sued the defendants, his late partners, to recover a sum of money, on an account stated; he failed to prove a statement of accounts, and thereupon asked for a decree for the partnership accounts to be taken, when a decree was made.

Held, on appeal, the case fell within clause 7, section 2 of Ordinance IV of 1878, and the decree was properly made.

The Court of Appeal has power, under section 25 of Ordinance 3 of 1878, to review, and vary if needs be, an order as to costs, made by the Court below.

The plaintiff and defendants had been partners in the chop "Ban Huat," which had closed business in 1878. The partnership accounts were never gone into, but they having been kept by the defendant Khay Thye, he was applied to, by the plaintiff, for payment of his share in the business: the said defendant however made no payment, but handed the plaintiff an account by which he attempted to make out the defendant Sin Eng Soon and another partner at Padang, were liable to pay the plaintiff certain monies for his said share. The plaintiff on getting this account, called on the defendant Sin Eng Soon for payment; but that defendant refused to pay same, and denied the correctness of the account so rendered to the plaintiff. The plaintiff thereupon sued

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1883.

NOORSAH
BAWASAH
MERICAN
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WM. HALL
& Co.

PENANG.

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1884.
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both the said defendants Khay Thye and Sin Eng Soon to recover \$2,340.75, [the amount shewn by the aforesaid account] as on an account stated. The defendant Sin Eng Soon in his statement of defence, denied the account stated, and his liability to the plaintiff. The defendant Khay Thye in his defence, set up an agreement and award, by which he alleged the aforesaid amount was found due to the plaintiff, and that the plaintiff was not to look to him [Khay Thye] for payment, but only to the defendant Sin Eng Soon and the partner at Padang.

The plaintiff, in his reply to this defence, denied the agreement and award alleged, and, among other things, claimed [in paragraph 10 of his reply], that the partnership accounts should be taken, if necessary. The plaintiff, by his statement of claim, not only claiming the amount aforesaid on an account stated, but also "such further or other relief as to the Court should seem right." The case was heard before *Wood J.* when the learned Judge held, that the defendant Khay Thye had failed to prove the agreement and award set up by him, and that the plaintiff had also failed to prove the account stated—but, at the request of the plaintiff's Counsel, and as the plaintiff had claimed further and other relief, the Court made the usual decree for the partnership accounts to be taken by the Registrar. The learned Judge also held, that as the defendant Khay Thye had failed to establish the defence he had set up, the plaintiff was entitled to his costs up to the decree, as against him: and that the plaintiff having failed to prove his account stated, he was liable to pay the defendant Sin Eng Soon his costs, with a right to be recouped same by the defendant Khay Thye: but, under the present practice,—and on the authority of *Rudow v. Great Britain Assurance Co.*, 17 L. R. Ch. Div. 600, cited by Counsel for Sin Eng Soon,—directed the defendant Khay Thye to pay both the plaintiff's and the defendant Sin Eng Soon's costs, up to decree.

The defendant Khay Thye, appealed against this decree and order.

27th February, 1885. The appeal now came on to be heard before the full Court of Appeal consisting of *Sidgreaves C. J.*, *Ford* and *Wood, J. J.*

Thomas, [*Presgrave* with him] for Khay Thye contended, that the plaintiff was not entitled to a decree for accounts, under the claim for further relief—and should, on failing to prove his account stated, have been non-suited: the claim for further relief if it could include such a decree as was made, was inconsistent with the claim on an account stated. They also contended that the order as to costs, was improper under the circumstances, and should be varied.

Ross for Khoo Yah Hong contended, that the prayer for further relief was sufficient to admit of the decree for accounts

being made, and even without it, the Court, in order to avoid multiplicity of suits, had power, under section 2, clause 1, 4 & 7 of the Civil Law Ordinance 4 of 1878, to make the decree. He cited *Tharp v. Macdonald*, 3 L. R. Prob. Div. 76, and *Hedley v. Bates*, 13 L. R. Ch. Div. 501, 2, as in point. As to the costs, he contended no appeal lay for costs; and the three grounds of appeal, mentioned in section 2 of Ordinance 1 of 1883, excluded by implication, such an appeal—or indeed any appeal from what was matter of discretion; that that section in effect was the same as section 49 of the Judicature Act of 1873 [36 & 37 Vict., C. 66] and costs were in the discretion of the Court.—Sec. 463 of the Courts Ordinance III. of 1878.

SIDGREAVES,
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& }
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Van Someren for Sin Eng Soon, supported this argument; and as to the costs, referred to *Graham v. Campbell*, 7 L. R. Ch. Div. 490; *Hope v. Carnegie*, 4 L. R. Ch. Ap. 264; *Taylor v. Dowles*, Ibid. 697; and Ordinance 3 of 1878, section 25, which is as follows: "The Supreme Court shall have full power in all suits, matters, and proceedings which may be instituted in the said Court, whether in its original or appellate jurisdiction, to award and order such costs to be paid, by either or any of the parties, to the other or others, whether the same or opposite parties, as the said Court shall think just."

Sidgreaves, C. J. This case is somewhat complicated by the relative positions of the parties to the appeal, and has been made more so, by the pleadings, and procedure adopted at the trial. The plaintiff sued on an account stated, and the single issue on that claim was, was there such a statement of accounts. In his reply [para. 10] however, we have a departure from this simple issue, and a claim for partnership accounts was set up. The defendant Khay Thye in his defence also raised a further and independent issue of an award having been made. The Court below found against both the award set up by the defendant Khay Thye, and the account stated set up by the plaintiff, but made a decree for partnership accounts. It is now objected on this appeal, that this decree was improper. For the plaintiff, it has been urged, that the Court had a discretion; and under the circumstances, and in order to avoid multiplicity of suits, could under section 1, cl. 7 of the Civil Law Ordinance 4 of 1878, make the order. That clause is as follows:

"The Court in the exercise of its original and appellate jurisdiction, in every cause or matter pending before it, shall have power to grant, and shall grant, either absolutely or in such reasonable terms and conditions as to it shall seem just, all such remedies, whatsoever, as any of the parties thereto may appear to be entitled to, in respect of any and every legal or equitable claim, properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

It seems to me, this clause is strictly applicable to the case and a decree for accounts is within its provisions. I think therefore, this appeal fails on that point. On the question of costs, however, I am of opinion the Court below should not, under the

SIDGRAVES, C. J.,
 FORD, & J. J. WOOD, }
 1884.

circumstances, have ordered the appellant to pay the costs of the plaintiff or the defendant Sin Eng Soon: and the order we should make is, that each party should pay his own costs, both in the Court below, and of this appeal.

KHOO YAN
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Ford, J. I concur in the judgment of the Chief-Justice. I think it was hard on the defendant Khay Thye to have been made to pay the costs, when the case was not decided only on the issue put by the plaintiff before the Court. That issue was decided against the plaintiff; and in the ordinary state of things, he would have been non-suited, and would have had to pay costs. The plaintiff however alters his case, and relies on the general powers of the Court, under the Civil Law Ordinance, and then gets his decree. I think, under these circumstances, it was but fair each party should pay his own costs; and under section 25 of the Courts Ordinance III. of 1878, we should make that order, both as regards the costs of the Court below, and of this appeal.

Wood, J. I concur in the first part of the judgment of the Court. As to the costs, I still think, I was right in ordering the defendant Khay Thye to pay the costs, both of the plaintiff and the defendant Sin Eng Soon. I do not however intend formally to dissent from the order proposed by the rest of the Court.

Appeal dismissed—Order as to costs, varied.

VULCAN MATCH CO. v. HERM. JEBSEN & CO.

PENANG.

WOOD, J.
 1884.

March 10.

Semble. The Registration of Trade-Marks Act, 38 and 39 Vict., c. 91, does not apply to this Colony, and section 6 of the Civil Law Ordinance IV. of 1878, which extends to this Colony—mercantile law generally as it is in England, has no reference to so specific and exceptional a subject.

A trade-mark may be acquired in this Colony, under the common law, and independently of the statute abovementioned.

The fact that the registered owner of a trade-mark, in addition to the registered mark, has other marks and figure about it, as mere adjuncts thereto, does not deprive him of his right to such registered mark, or prevent his suing a person who copies such registered trade-mark.

The measure of damages for copying a trade-mark, is the amount of injury done to the plaintiff, by the illegitimate trade practised therewith by the defendant.

This was an action to recover damages for piracy of a trade-mark, and an injunction restraining the defendants from further using such trade-mark. The nature of the trade-mark, and manner in which same was copied, and the points arising in the case, sufficiently appear in the judgment.

Ross, for plaintiffs.

Thomas, for defendants.

Wood, J. In the course of the argument I incidentally remarked, I was of opinion that substantially the registered trade-mark, as shewn in the Certificate of Registration, is a globe, and the word "Vulcan." I have found no reason, since the close of the arguments, to alter that opinion. This globe is used by the plaintiffs as a red globe, with a scroll in which the word Vulcan is written. This scroll, although not part of the registered trade-

mark, has taken hold of the fancy of the public in the Straits, insomuch that the mark is known as the *red circle* mark or the *snake mark*, the scroll being something like a double-headed snake, and I look upon it as clear, beyond all reasonable doubt, that the defendants have not only taken and used a portion, and to an uneducated person and a foreigner, who cannot read the language, the distinctive mark, but have copied the adjuncts as used by the plaintiffs so as intentionally to deceive the public, and avail themselves to a not immaterial extent of the vested interests of the plaintiffs in this particular brand of matches.

It has been argued for the defendants, that the plaintiffs must use the registered mark, but here they have varied it in a material degree. I cannot follow this argument, for I consider the trade-mark is reasonably shewn to be a globe, and the word Vulcan, and the size, colour, spaces of black and marks of coins are, as I have said, adjuncts only, which are not in their nature distinct parts of any trade-mark.

It was further contended that the Act 38 and 39 Vic., c. 91, [Registration of Trade-Marks Act,] was introduced into this Colony by Ordinance IV. of 1878, section. 6, and the requirements of that Act had not been complied with.

I doubt however if the words "mercantile law generally" in that section [a] have reference to anything so specific and so exceptional as the registration of trade-marks; they must I think, be held to have reference only to the law of buying and selling merchandise.

I hold that the general and common law of trade-marks applies here unless the Registration Act prevails; that if that Act is law here, I consider its requirements have been followed, and the defendants have infringed the rights of the plaintiffs, in copying a material portion of their trade-mark. If the Registration Act does not apply, they have copied a trade-mark which the plaintiffs have acquired by usure.

The measure of damages, I consider to be the injury done to the plaintiffs by the illegitimate trade practised by the defendants. They have sold 150 boxes bearing an imitation of the plaintiffs' trade-mark, but I consider that is not the measure of damages, because they were offered at a lower price.

The plaintiffs might have suffered some loss to the extent of a certain indefinite number of boxes which the defendants have sold at a lower price, and also had the boxes sold by the defendants been proved to be inferior the plaintiffs might have suffered in credit, but it was not proved that the defendants' goods were inferior.

Under the circumstances, being of opinion that the action is well brought, and that the plaintiffs have sustained some, though

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SEN & Co.

[a] Section 6 of Ordinance IV. of 1878: "In all questions or issues which may hereafter arise or which may have to be decided in this Colony, with respect to the law of partnerships, joint stock companies, . . . and with respect to mercantile law generally, the law to be administered shall be same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any Statute now in force in this Colony or hereafter to be enacted."

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SEN & Co.

an uncertain and probably a very small sum, by way of damages, I find for the plaintiffs, with \$250 damages and costs, and also grant a perpetual injunction, in the terms prayed.

TAN HOON CHEANG & ORS. v. HERVEY.

SINGAPORE.

FORD
ag. C. J.,
1884.

May 26.

A suit brought under section 15 of Act 14 of 1859, for recovery of land from which the plaintiff has been forcibly dispossessed, is not "a suit for the recovery of land," within the meaning of the section 165 of the Civil Procedure Ordinance V of 1878; and a defendant in such a suit cannot therefore merely plead that he is in possession, but must deal with the several allegations in the statement of claim, and disclose his defence in his statement of defence

This was an action under section 15 of the Limitation Act XIV of 1859, by certain residents of Malacca, against the defendant, the Resident Councillor of that Settlement. The defendant under the provisions of section 165 of the Civil Procedure Ordinance V of 1878, merely pleaded that he was in possession. To this plea the plaintiff demurred. By the said section 165, it is enacted, that "no defendant in a suit for the recovery of land, who is in possession by himself or his tenant, need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground, against any right, or title asserted by the plaintiff. But, except in the cases provided for in Chapter 6, [ss. 77-81] it shall be sufficient to state by way of defence that he is so in possession. And may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned." The point raised in this case sufficiently appears in the judgment.

Davidson [Buckley with him] for plaintiffs.

Bonser [Attorney-General] for defendant.

Cur. Adv. Vult.

On this day judgment was delivered by

Ford, Acting C. J. The action in this case is brought under the provisions of section 15 of Act XIV of 1859 [which however is not in form pleaded] the words of which are as follows:—

XV. If any person shall without his consent have been dispossessed of any immovable property otherwise than by due course of law, such person or any person claiming through him shall in a suit brought to recover possession of such property be entitled to recover possession thereof notwithstanding any other title that may be set up in such suit, provided that the suit be commenced within six months from the time of such dispossession. But nothing in this section shall bar the person from whom such possession shall have been so recovered or any other person instituting a suit to establish his title to such property and to recover possession thereof within the period limited by this Act.

The statement of claim in the action alleges previous ownership by the plaintiffs of a certain piece of land, and dispossession of the plaintiffs by the defendant without their consent, within six months of date of action brought, omitting however that such dispossession was otherwise than by due course of law, and asks for recovery of possession of the said piece of land.

The defendant in his statement of defence pleads simply that he is in possession of the land.

To this defence the plaintiffs demur not as to the form of the plea, but as to its effect in law, urging that under the rules of pleading, in sections 169 and 172 of the Civil Procedure Ordinance 1878, it admits all facts which are not denied, and thus raises the real issue between the parties as one of law only, and is more conveniently tried in this form than by going to trial here or at Malacca.

The defendant is not prepared to have the case tried in this form, on the ground that the plea must not be taken in an action for the recovery of land to admit facts stated in the statement of claim and not denied or refused admission.

In support of this view, he cites the special provisions made in section 165 for statement of defence in actions for recovery of land, and the case of *Danford v. McAnulty*, L. R. 6 Q. B. D. 645, and in the House of Lords in 8 App. Cas. 456, decided on analogous sections in the English Act. There can be no doubt that the defendant's contention is correct if this action is an action for the recovery of land within the 165th section; the authority of the case before the House of Lords being conclusive on the point. That case, however, and the case to which section 165 applies, seem to me in substance very different from the present action. It is true that the old action of ejectment, and the new action for recovery of land were and are, in form, for the recovery of *possession*, but the question involved in those forms of action is always one of title between the parties, a question which in the form of action brought under the Indian Act of 1859 is expressly shut out, and seems a class of action not specially contemplated by our Procedure Ordinance, as the case of the ordinary action for recovery of land is. The form of action, although within the words of section 165, is not, I think, within the *purview*; the whole gist of actions under that section being a question of title, the gist of action of the class brought being one of hostile and unlawful seizure irrespective of the title of the parties. Therefore were I compelled to decide this question simply upon the pleadings now before me and as a question of technical correctness, without exercising those large powers of amendment which sections 9, 184 and 196 of the Procedure Ordinance give me, in order to do complete justice between the parties, I should so far do so in favour of the plaintiffs' contention, holding that suits of this class are not within the provisions of section 165, such an action differing so essentially in character from the ordinary action of ejectment or recovery of land.

On the other hand, it is equally clear to me that even allowing the plaintiffs' contention upon this point to be correct, I might have in the result to dismiss this demurrer as their pleadings do not allege that their dispossession was otherwise than in due course of law: a defence clearly within the rights of the defendant to raise on the argument of the demurrer. But the Legislature has here, as I think, given, and very wisely given, large powers to the Judges, powers not contained in the analogous Acts

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in England [*vide* sections 9 and 196 before referred to], when the real issue between the parties is apparent, to amend and put pleadings in such form as without further expense or delay shall be necessary to do complete justice between the parties: and taking this view of my duties generally, but more especially in a case of this kind which has been removed from Malacca for the very purpose of avoiding needless delay and expense, what I propose to do is this:

To direct motion for demurrer to stand over; to give plaintiffs leave to amend their statement of claim within one week by adding that part of section 15 of the Act of 1859 which he has omitted; with leave to defendant to amend his statement of defence within a week from service of amended statement of claim upon him, denying, declining to admit, or otherwise, as he may be advised, the statements of facts in such amended claim. Whether the cause can be heard again on motion of demurrer, or go to a hearing on questions of both law and fact, will have to be determined by the course the defendant may pursue in amending, or not amending, his statement of defence.

It is obvious that in a case of doubt [such as the question of the applicability of section 165 to actions of this kind may be said to be], it would be very unfair to the defendant to compel him to abide by his pleadings without an opportunity of denial of facts, which really constitute the plaintiffs' right to bring this action.

CHEAH TEK THYE v. HASSAN KUDUS.

PENANG.

WOOD, J.
 1884.

August 14.

A memorandum in an Auctioneer's Book, setting out conditions of Sale, at foot of which was his signature as auctioneer—and then setting out, in columns, the numbers of lots sold, measurements, name of purchaser, amount of purchase money, and signature of purchaser, in which last column, the purchaser signed his name opposite certain lots, but which did not give a description as to the locality of the lots, nor use words connecting the conditions of sale with the lots following,

Held, a sufficient memorandum, or contract in writing, within section 4 of the Statute of Frauds.

A vendor cannot maintain an action against a purchaser for non-completion of the purchase, if it can be shewn that his title is open to serious question, and possible litigation with contiguous land owners.

Defendant purchased, at various prices, certain lots of land from the plaintiff, each lot being knocked down to him separately, whereupon he signed a memorandum of purchase against each lot, but subsequently declined to complete the purchase, as the plaintiff's title deeds did not appear to contain the whole quantity of land put up by him in lots to auction, on the occasion in question, and also a large portion of the 28 lots purchased by him [defendant] was claimed by a contiguous land-holder. The exact quantity laid claim to, however, it was difficult to ascertain without litigation or a full survey of the District.

Held, that the plaintiff's title was faulty in a material point, and he could not therefore recover damages for the non-completion, by the defendant, of the purchase.

Action to recover damages for breach of contract for the purchase of 28 lots of land at Sungei Pinang, in Penang. Plea *inter alia* 1. that the defendant did not contract, and 2. that the plaintiff had no title to a material portion of the land sold. Issue thereon. It appeared that the plaintiff, an auctioneer, sold a large

strip of land in Sungei Pinang aforesaid, which he had divided into a great many lots; that the whole of the land so sold by him was said to be comprised in Grant No. 937, estimated to contain 21 square orlongs, or thereabouts; that the defendant purchased 28 of these lots measuring 460 x 480, and at the time of his purchase, as each lot was knocked down to him, signed a memorandum of purchase which is hereinafter set out; that he subsequently declined to complete the purchase, whereupon the plaintiff brought this action. For the plaintiff it was contended, the defendant neglected to complete the contract as he had not the funds to do so. For the defendant it was alleged, that he had always insisted on the plaintiff shewing his title to the said 28 lots, but as the plaintiff neglected to do so, he [defendant] declined to complete the purchase. It also appeared that a large portion of the land comprised in the 28 lots, adjoined the land of one Haji Mahomed Salleh, who claimed that a portion of the land included by the plaintiff in the 28 lots, belonged to him,—but as his Grants only gave the area and not the boundaries and measurements of his land, it was impossible to say how much of the 28 lots was included in his Title Deeds. It further appeared, that the whole of the lands divided into lots by the plaintiff, and of which the 28 lots sold to defendant was part, comprised an area of 100 and odd acres, whereas the land he was entitled to under Grant No. 937, only comprised 21 orlongs, as already stated. It was impossible to tell, without a complete survey of the whole district, whether the portion of the 28 lots sold to defendant, and claimed by the said Haji Mahomed Salleh, was included in the 21 orlongs or not; but it appeared to be more than probable that it was not, as the Sungei Pinang, which was the Northern boundary of the land comprised in Grant No. 937, was a fixed land mark, and the portion of the 28 lots claimed, apparently laid a greater distance from this river than it might be supposed, land included in the 21 orlongs, would lie.

The following was the memorandum of purchase signed by the defendant :

CONDITIONS OF SALE.

- " 1. One-third of the purchase money to be paid on the day of sale.
2. Possession to be given on completion of purchase money within 3 days.
3. Expenses of conveyance and stamp duty to be borne by the purchaser.
4. On any failure of payment as above, the property to be re-sold, and the deficiency, if any, together with the expenses to be borne by the purchaser in default.
5. The property sold to be at the risk and expense of the first purchaser immediately the lot is knocked down.

CHEAH TEK THYE,

Auctioneer."

PENANG, }
29th December, 1883. }

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The following are the lots sold.

CHEAN TEK THYE v. HASSAN KU- DUS.	No. of Lot.	Measurement.	Name of purchaser.	Amount of purchaser money.		Signature of purchaser.
				\$	cts.	
	76	20 x 120	Hassan Kudus.	270	00	H. Kudus.
	77	"	"	"	"	"
	78	"	"	"	"	"
	79	"	"	"	"	"
	80	"	"	"	"	"
	81	"	"	"	"	"
	82	"	"	"	"	"
	83	"	Hassan Kudus.	236	00	H. Kudus
	84	"	Hassan Kudus.	240	00	H. Kudus.
	85	"	"	"	"	"
	86	"	"	"	"	"
	87	"	"	"	"	"
	88	"	"	"	"	"
	89	20 x 117 x 119	"	"	"	"
	132	20 x 120	Hassan Kudus	310	00	H. Kudus.
	133	"	"	"	"	"
	134	"	"	"	"	"
	135	"	"	"	"	"
	136	"	"	"	"	"
	137	"	Hassan Kudus.	290	00	H. Kudus.
	138	"	"	"	"	"
	139	"	"	"	"	"
	140	"	"	"	"	"
	141	"	"	"	"	"
	142	"	"	"	"	"
	143	"	Hassan Kudus.	420	00	H. Kudus.
	144	"	"	"	"	"
	145	18 x 112 x 115	"	"	"	"

On conclusion of the plaintiff's case,

Thomas for defendant submitted, that there was no sufficient contract or memorandum in writing within section 4 of the Statute of Frauds [29 Car. II c. 3]; that the conditions of sale were not part of the contract, and though signed by the auctioneer, and immediately preceding the description of the particular lots, was not necessarily connected with the lots so described; that contiguity alone did not suffice, and there were no words to connect the conditions with the lots sold. The defendant signed opposite the several lots knocked down to him, but there was nothing to indicate his assent to the conditions of sale; that the fact that such conditions were already written and standing in the position they were, did not make any difference, even though intended to be the conditions of sale of the particular lots following; were it otherwise, the very object of the Statute would be defeated, and parol evidence would be required to supply that which the statute required to be in writing. There were also no words of contract such as "bought" or "sold," or the like, and the *locus in quo* was not sufficiently described, and parol evidence was also required to shew that the particular lots, mentioned in the memorandum, referred to the land at Sungei Pinang: the description was consistent with a sale of land in any part of the Settlement.

Van Someren [Capel with him] for plaintiff was not called on.

Wood, J. I consider that the conditions of sale are part of the contract, and are sufficiently connected therewith and therefore a good memorandum of purchase within the Statute of Frauds. The signature of the defendant, under the column "name of purchaser," was sufficient to shew he was the purchaser of that lot opposite his name, and the entry, taken altogether, shew the plaintiff to be the vendor, and defendant the purchaser of such lots. The subject-matter of the purchase is also capable of being identified by parol testimony, and this is permissible by law.

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The case then proceeded on the merits, when the several facts before narrated, appeared in evidence. The questions then raised and argued, sufficiently appear in the judgment.

Van Someren [Capel with him] for plaintiff.

Thomas for defendant.

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September 15. *Wood, J.* In this case, judgment will be for the defendant on the following grounds:—Although I find as a fact, that no demand of proof of title was made, or any question of title raised by the defendant before action brought, yet the plaintiff is in this position, that the piece of land—portions of which the defendant agreed to purchase—are faulty in its boundaries, more being included in the area of that piece of land,—portions only of which, were sold to defendant—than he is entitled to, and that to a considerable extent. It would appear to be impossible to settle the exact dimensions of the lot, or its exact position, without agreement as to boundaries between contiguous owners, or a trial at law: a defect in title, not capable of money valuation, so as to admit of the application of any equitable view of the case.

I am of opinion, that with the serious defect of title, the plaintiff has no cause of action against the defendant at law, or in equity, unless he is able to shew affirmatively, that the entire piece of land which was sold in lots is, as to extent and position, beyond reasonable doubt, his own. The defendant cannot in my judgment, be sued for the non-completion of a purchase of land, the title to which is shewn to be liable to dispute; and although I cannot find direct authority in point, I am of opinion, that as a general principle, in an action for the non-completion of a purchase of land,—if the defendant can shew that what he has contracted to buy, is faulty to the extent of the title being open to serious question, and which defect he has not waived,—the plaintiff cannot recover. In such a case, as it appears to me, the parties are not *ad idem* as to the subject-matter of the contract. Plaintiff agrees to sell, and defendant agrees to purchase a piece of land, the title to which is assumed to be clear from doubt—but the facts shew such a substantial defect in title, as is sufficient to justify the defendant in his breach of contract.

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I cannot in principle distinguish this case from the large class of cases touching upon "misdescription." In effect, by his conduct, though not in actual words, the plaintiff has misdescribed the property sold, and in such cases the rule of law is now clear.

"Where the misdescription, although not proceeding from fraud, as in a material and substantial point, so far affecting the subject-matter of the contract, that it may reasonably be supposed, that but for such misdescription, the purchaser might never have entered into the contract at all, the contract is avoided altogether: under such a state of facts, the purchaser may be considered as not having purchased the thing which was really 'the subject of the sale'.—*Per Tindal C. J. in Flight v. Booth*, 1 Bing. N. C. 377.

I have already, in the course of the case, found, as matter of law, that there was a written contract of purchase on the part of the defendant; and as matter of fact I find, that the defendant, though he was indifferent to the proof of title before action, has never waived this particular defect in title. Seeing however, that the question of this defect in title was never absolutely raised between the parties—or a demand of proof of title made before action brought—I was in doubt as to whether the plaintiff was not misled into bringing this action, and so entitled to a favourable consideration in the matter of costs, but as to this, inasmuch as the defect is so far patent, that the plaintiff ought to have known the faultiness of his own title, the judgment will be for the defendant, with costs.

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PENANG.
—
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—
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In order to enable a plaintiff to recover damages for loss alleged to be due to the negligence of the defendant, it must be clearly proved and without reasonable doubt, that the loss is attributable to the negligence.

So where the defendants in repairing a boat for the plaintiffs, repaired the same negligently both as regards the materials and workmanship; but such defect was a fair height above the load line of the boat when on an even keel; and the boat sunk one morning, shortly after the repair had been executed, while at anchor, lying on an even keel on a fair calm day, so that the defects were above water, and the sinking of the boat could not be reasonably attributed to it,—and although it was not shewn that there was any other defect in the boat, or any other cause which could have led to her sinking,

Held, the plaintiffs could not recover from the defendants, the loss occasioned by such sinking of the boat. On appeal this decision was affirmed.

Held, also [by the Court below] that although the negligence in the defendants' repairs necessarily hastened the sinking of the boat, after the defect had got below the level of the water, yet, unless the sinking could be shewn to be attributable to the defect, as a *prime* or material cause, the action was not maintainable.

Action for damages for negligent repair of a boat of the plaintiffs, whereby she sank, and her whole cargo [sugar] was lost. Plea, 1. denying the negligence; 2. denying that the sinking of the boat was attributable to the alleged negligent workmanship. Issue thereon. There was also a counter-claim for work and labour done and a defence thereto, but nothing turned on it

which requires to be reported. The facts and evidence, and the points raised, are fully referred to in the judgment.

Ross for plaintiffs.

Van Someren for defendants.

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September 12. *Wood, J.* In this case I have delayed giving final judgment not from any doubt as to the result, but with the view of enabling the plaintiffs should they be dissatisfied with it, to apprehend with clearness the several points of law or fact raised in the case.

As matter of fact, I find that the Gheum planks put in by defendants were slightly green and liable to shrinkage; it was, I think, fairly their duty in repairing the top sides of the boat in question, to have replaced teak by teak, which is a wood least liable to shrinkage; and more particularly in putting in 2 of these Gheum wood planks from some oversight or neglect they had allowed a space to intervene between 2 planks as wide as $\frac{1}{2}$ of an inch for a distance of some 2 feet on her starboard side at a height of 6 inches from the load line when freighted with a full cargo. This, I think negligence on the part of the defendants.

It is however clear to my mind that in order to enable the plaintiffs to recover for full amount of the loss of their cargo of sugar the accident which caused this loss should be clearly and without reasonable doubt attributed to the defects which I have already adverted to. The onus of this proof was upon the plaintiffs and in this lay the real difficulty of the case.

The plaintiffs showed by means of evidence, which, if uncontradicted could have carried conviction with it, that the boat fully loaded left Bukit Tambun and arrived safely at Pulau Kra, where at 4 or 5 o'clock A.M. she was safely anchored and free of water. That then the wind blowing fresh from the N.E., she made one tack towards Pulau Jeraja and going about made her west tack towards Juru, that on this the port tack she listed naturally towards the starboard side, thus submerging the faulty seam which was as above observed 6 inches above her load line when on an even keel. That the men then noticed, after some $\frac{1}{2}$ hour's sailing on this port tack that the ship was making water fast, and being unable to detect from what leak the water was making, they kept on their course for Juru, and the nearest land, but notwithstanding all their efforts in pumping and bailing, she went down not heading for Juru, but at the moment of foundering swinging round an angle of some 120 degrees and eventually sinking with her head pointing to Penang.

This account if strictly to be relied on, might fairly prove the case for the plaintiffs, though it may possibly be questioned, whether the water pouring through the space between the faulty planks $\frac{1}{2}$ of an inch wide, but in which the oakum still remained—though doubtless loosely packed, until driven through the seam by Mr. Vermont at Pryer Dock after the boat was raised—could have caused her to founder in so short a time—and her subsequent lurching in the act of sinking, so as to cause her to

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sink with her head in the direction of Penang, is a coincidence somewhat startling.

These facts were supported by the evidence of the native boatmen, and was given with every reasonable clearness and apparent truth.

To this is opposed the evidence of Mr. Irving which I give in full, so far as it relates to this branch of the matter.

"I am an Engineer on my own account and reside at Sunghy Penang. I remember the cargo boat going down. I was at Juru, on the end of Juru hill, the S. end. I was putting up a stone crusher for Government. I could see all that was going on around. At about a little after day-light, about 6, I saw the boat a little to the south of Juru not a mile and $\frac{1}{2}$ —from a mile to a mile and $\frac{1}{2}$ —from Juru Hill. She was at anchor all the morning so far as I saw, no sail set. I could see her distinctly. I knew her to be Mr. Vermont's cargo boat, a sugar boat. The other boat was a rum boat belonging to Mr. Vermont. The boat was lying with her head towards Penang, it was the first of the springs. I noticed her again. From time to time I continued to see her still at anchor, until at 8 she commenced to swing on the same spot, with her head towards Penang and her stem towards the Province. She listed over to starboard—this attracted my attention. I then never took my eyes off her.

"About 3 minutes after that she sunk, stem foremost; and when she went down she sent a large volume of water up as high as the mast spray. I imagine this cause through the hatchees. She was then still at anchor. She had never moved from the spot and was never under weigh. The sails were the same as when I saw her in the morning. I did not take particular attention of the men on board. I ran to try and get a boat, but I could not I noticed that the rum boat took up her anchor. She set her sails and I could see the splash as of oars in the water—they pulled up to her. She was $\frac{1}{2}$ a mile from the other boat. There were one or two Chinese junks nearer to us. They made up to the sinking boat and took the men off. It was a very still morning. There was not a breath of wind, all boats were at anchor. The sea smooth as the table. I have had no communication with the men. . . . "I suppose she must have listed over from water being in her. . . . boats do so list. I did not see her pumps. This is the only cause I can suppose for her sinking. She was distant from Pulau Kra as far as from Pulau Jeraja."

Cross-Examined "I slept at Juru that night and for a fortnight before. I did not see her overnight. She may have been there. We commenced work at 6 or 6.30. I saw her the first thing in the morning as I cast my eyes over the channel. She had her head towards town. I was walking about and seeing after the work. I can swear, that what I am told was said by the Captain and other witnesses, is false, because I had a long chair. I got up and sat down in the chair. She could not have made a long tack for she was in the same place as when I first saw her, in the same relation to the chair and a house. I could not have seen them at Pulau Kra unless outside of Pulau Kra altogether. It was not blowing fresh I am equally positive as to that. I first gave an account of this which I have said now about the boat being stationary to Mr. Van Someren and Mr. Logan. I don't remember if I told Mr. Vermont. I can't tell how long it was before I saw her list that I saw her last. I could not help seeing her but took no particular notice. It was a very clear morning. The 2nd boat was from $\frac{1}{2}$ to $\frac{3}{4}$ of an hour in getting up to the 1st boat. . . .

Re-exd. "I had no European with me when I saw the boat go down. I suppose the compressed air blew up the water in spray as she went down."

It was strenuously urged by Mr. Ross for the plaintiffs that in view of this manifest contradiction between the two classes of

witnesses, the Court ought to rely upon the evidence of the men, and that the evidence given by Mr. Irving was unreliable. To this view of the case I could not incline. I cannot suppose that Mr. Irving would have ventured to assert his perfect recollection of the details of an accident which must have made a strong impression upon him unless they were true. It was admitted that Mr. Irving was a gentleman of character and ability, and as he himself stated in Court having had some 10 years' experience at sea.

With such strong contradiction in the case, it is impossible to say the plaintiff has clearly made out his case, in attributing the loss of the cargo to the defects which existed in the vessel as repaired by the defendants. I cannot find a verdict in his favor at a peradventure. The boat had been lying as Mr. Vermont says for 10 days "at the works rising and grounding with the tide as all other boats do, during weather in which there was no rain but with strong easterly dry winds blowing." The boat sank beyond reasonable doubt from leaks somewhere, but if Mr. Irving's evidence is to be taken as true, she sank while at anchor and on an even keel. Possibly, I may say probably, the dry winds may have opened seams between her water-line when light, and her load line when loaded, and she may have put to sea in a thoroughly leaky condition, and by the negligence of her crew in neglecting to sound her she may have gone down in this way.

Possibly, almost necessarily, the faulty repairs executed by the defendants may have hastened the catastrophe as soon as she sunk below the faulty seam, but unless the loss of the boat can be clearly shown to be due to the defects I have named, as a prime cause, I cannot in the teeth of so direct a contradiction as exists in this case, and with a full consideration of the unreliability of native testimony, find in favor of the plaintiff.

The plaintiffs appealed against this decision,—leave to appeal on the facts, having been applied for and refused.

27th February, 1885. The appeal now came on for hearing before the full Court of Appeal consisting of *Sidgreaves*, C. J., *Ford* and *Wood*, J. J.

Ross, for the appellants contended, that the plaintiffs having proved there was a defect in the boat, due to the bad workmanship of the defendants, and that the boat had sunk, had made out a *prima facie* case and the onus was on the defendants to shew some other defect which caused the loss: that in the absence of their doing so, it was but fair and reasonable to presume that the boat sank in consequence of the defect he had shewn. *Radley v. London & North Western Railway Co.*, 9 L. R. Ex. 71, on Appeal 10 L. R. Ex., 100, and on further appeal, 1 L. R. App. Cases. 754. At all events, if such defect did not cause the boat to sink, it contributed to the sinking of the boat, as once the defect was under water, it poured in in greater quantity and hastened her sinking. The Court below admitted this was probable, and the defect therefore, if it did not originate, certainly increased the sinking. *Smith v. London & South Western Railway Co.*, 5 L. R. C. P. 98, on appeal 6 L. R. C. P. 14. It was no use for the defendants to say the boat would have gone down

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SIDGREAVES, even without the defect in their workmanship, *Nitrophosphate Co. v. London & St. Katherine Dock Co.*, 9 L. R. Ch. Div. 503. In fact it was by no means proved such would have been the result: the plaintiffs might as well say, although there might have been a defect elsewhere in the boat, she would not have gone down, but for the defendants' bad workmanship increasing the volume of water rushing into the boat. The boat but for that defect, might have reached land which was not far off. The plaintiffs were entitled to have their boat tight and staunch, and the defendants certainly did not so repair the boat, as is found as a fact by the Court below, and the plaintiffs are, at least, entitled to have the damages apportioned between that caused by the defendants' defective workmanship, and that caused by any other defect. *Burroughs v. Marsh Gas Co.*, 5 L. R. Ex. 67.

Van Someren, for respondents was not called on.

Sidgreaves, C. J. The Judgment of the Court below might be somewhat unguarded as regards certain of its expressions, but it finds definitely that the loss was not due to the defect. The plaintiffs might have another action for breach of contract for the repairing of the boat, and recover the value of proper wood and labour that should have been used and employed, but to try and recover for the present loss by reason of such negligence, is a different matter, and unless the negligence was connected with the loss, the plaintiff cannot succeed. The loss here, it has been found, had nothing to do with the defect. The judgment, in my opinion, should therefore be affirmed.

Ford, J. The facts of this case cannot be gone into by us; if it could, possibly another mind might have reached at a different conclusion than that come to by the Court below. That Court however has distinctly found that the defendants' negligence did not cause the loss. The language of the judgment in the Court below might perhaps admit of doubts, as to the exact finding of the Court; for instance, that if there was no contributory negligence, yet the defect "hastened the catastrophe." If so, possibly the defendants would be liable to the whole damage, as it would be impossible to apportion it. But the learned judge who decided the case, has told us, he never intended to express that, but only that the defects did not cause the loss. The Court below having so found, we cannot disturb the verdict.

Wood J. My only regret is, that I did not express myself more clearly. Instead of saying "as a prime cause," I should have said "a material cause."

Judgment affirmed [a.] Appeal dismissed with costs.

[a] See *Siner v. G. W. Ry. Co.*, 3 L. R. Ex. 152, on App. 4 L. R. Ex. 117; *Adams v. Lancashire Ry. Co.*, 4 L. R. C. P. 739; *Jackson v. Metropolitan Ry. Co.*, 3 L. R. App. Cases, 193.

SHEDUMBRUM CHETTY v. ADAGAPPA CHETTY.

A principal sued his agent for an account, and after getting a decree for reference, objected before the Registrar, to certain items which appeared in the agent's accounts, on the ground that he had exceeded his authority. The Registrar was of opinion, that such an objection could not be entertained by him, and by his Report reserved the items and objection for the Court. On the Report being submitted to the Court, the principal did not further press his objection, and the items were allowed as matter of course. He then sued the agent for malfeasance and misfeasance in regard to these items, and the defendant pleaded *res judicata*.

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Held, [affirming the judgment of the Court below] that the matter was *res judicata*.

The principal, in the same enquiry into accounts, cross-examined the defendant as to a certain other item in the account, but raised no objection thereto; and the Registrar, assuming the same to be correct, allowed the item. He then sued the agent for malfeasance and misfeasance in respect of this item, to which action the defendant pleaded *res judicata*.

Held, [by the majority of the Court, Wood J. dissenting], that the matter in respect of this item, was not *res judicata*, as the plaintiff had neither raised, nor could he be said to have had a proper opportunity for raising an objection to it in the previous action.

The above two cases distinguished from each other.

A principal does not,—[in respect of an act of an agent who has exceeded his authority by making a loan, but who has obtained judgment therefor, and taken out a writ of execution against the debtor],—ratify the act of the agent, by levying on such writ, and applying the proceeds thereof, in part satisfaction of the claim. [Wood, J. dissenting].

Action to recover damages for malfeasance and misfeasance of duty as agent or servant of the plaintiff, and for balance due on accounts. The defendant in his statement of defence, alleged he had authority from the plaintiff to act as he had done, and also that the plaintiff's claim was *res judicata*. The following were the facts giving rise to the case. The plaintiff had been for some years a money lender and trader in Singapore. In January 1878, being about to leave Singapore for India, he appointed the defendant his agent, and left with him a power of attorney. In January 1882, the plaintiff being dissatisfied with the way in which the defendant had attended to his affairs, returned to Singapore, and on the 31st March, gave the defendant notice determining the agency. The defendant however continued to act for plaintiff till 10th April following. Not being able to get from the defendant what he considered satisfactory accounts, the plaintiff, in August following, commenced a suit against the defendant for such accounts, and in due course obtained a decree for reference. When the matter was before the Registrar, the defendant put in an account, in which, among other items, appeared the two following: I. a sum of \$6,000 paid by the defendant as agent for the plaintiff, on a promissory note for that amount, in which the plaintiff, through the defendant as his agent, became surety for one Seva Raman Chetty, a brother of the defendant, and to account of which item, the defendant, as such agent, had been repaid certain sums which reduced the original debt of \$6,000 to \$4,414.83. II. A sum of \$655.95 due by one Dorasawmy, a late Government contractor, for money lent him by the defendant, as plaintiff's agent, in order to enable him to carry on his contracts. This second item was not referred to specifically in the pleadings, and although in the enquiry before the Registrar, the plaintiff cross-examined the defendant with reference to same,

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yet no objection was taken by him to the item, and the same was allowed by the Registrar in the accounts. The first lot of items was specially objected to by plaintiff, before the Registrar, on the ground that the defendant as plaintiff's agent, had no authority to sign the plaintiff's name as surety for a third party. The Registrar declined to go into this question, considering it was one to be decided by the Court. In his Report, made in January 1883, on the accounts, he therefore reserved these items and the objection taken to same, and referred the question to the Court. On the Report being submitted to the Court in May 1883, the plaintiff did not insist on his objection, and the items were allowed as matter of course. The defendant was also allowed his wages as agent, up to 10th April aforesaid, and the report was also varied in respect of an item of \$107.50, with which the Registrar had surcharged the defendant. The result was, the final decree in the said suit was against plaintiff, and in favour of defendant, who was also allowed his costs, as between Solicitor and Client, against the plaintiff.

In 1881, the defendant being unable to obtain payment from the said Dorasawmy, commenced an action against him to recover the aforesaid sum of \$655.95, and got judgment therefor, and issued execution thereon. The action was brought by defendant in his own name, but for the benefit of the plaintiff, his principal. Nothing was recovered by him on the execution. On the arrival of the plaintiff from India, as aforesaid, the aforesaid judgment and writ [*fi. fa.*] were given over to him by defendant, and he [plaintiff] thereafter seized, in the name of defendant, on the said judgment and writ, certain property of the said Dorasawmy, and realized only about \$40 to account of the claim. He could recover nothing further.

After the suit for accounts had been decided against the plaintiff as stated, he in the same year, 1883, commenced this present action against the defendant, for malfeasance and misfeasance as aforesaid, in respect of the said two items of \$4,414.83 and \$655.95—to which, the defendant raised his defence of *res judicata*, based on the above facts. The case was heard on the 13th, 14th and 19th February, 28th April, 7th July and 13th August; and finally this-day.

Donaldson, for plaintiff contended, the defence of *res judicata* failed, as plaintiff had no opportunity of recovering these damages in the former suit, and referred to *Nelson v. Couch*, 15 C. B. N. S. 99.

Drew, [*Bond with him*] for defendant contended, the defence of *res judicata* was a complete answer to the action, and referred to *Brunsdon v. Humphrey*, 11 L. R. Q. B. Div. 712.

Ford J. held, as to the item \$4414. 83, the matter was *res judicata*, and accordingly disallowed the plaintiff's claim in this action, in respect of that item: but as regarded the second item \$ 955.95, the matter was not *res judicata*; and as the defendant had therein exceeded his instructions, the plaintiff was entitled to a verdict for that sum, and interest, less the amount received by the plaintiff, in the name of the defendant, from the said Dorasawmy. His Lordship further held, that in payment of

this balance sum by the defendant to the plaintiff, the plaintiff should assign to the defendant, for his benefit, the judgment recovered by him, as plaintiff's agent, against the said Dorasawmy; and that the costs of this suit, should be apportioned between the parties hereto, in respect of the above findings of the Court.

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Judgment accordingly.

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Both plaintiff and defendant appealed against this judgment, and such appeals were separately heard before the Court of Appeal, consisting of *Sidgreaves*, C. J., *Ford* and *Wood*, J. J.

7th April 1885. The plaintiff's appeal was now heard.

Donaldson for appellant. The plaintiff's claim, as regards the item for \$4,414.83, was not *res judicata*. The claim in the two actions are different. The present one was for misconduct as agent, a matter which could not have entered into the accounts in the first. No doubt the plaintiff had a right then, to repudiate the transaction, but that is not sufficient to estop him now in claiming damages for it. If he abandoned anything, he only abandoned that which he could not then recover. *Barrs v. Jackson*, 1 Y. & Col. C. C. 585; *Nelson v. Couch*, 15 C. B. N. S. 99; *Collins v. Cave*, 27 L. J. Ex. N. S. 146; the case is also one of hardship, as being caused by misunderstanding of plaintiff's Counsel in the first suit: the matter is not *res judicata* in all particulars.

Drew for respondent. The claim has been decided: the Registrar's report has been before the Court, and the whole matter disposed of. At all events, the issue was raised by the plaintiff, and then abandoned, that is sufficient *per Willes*, in *Nelson v. Couch*, 15 C. B. N. S. 109.

Sidgreaves, C. J. The omission of the plaintiff to press his objection at the proper time, after he had raised it and the question was reserved for the Court for his benefit,—is, in my opinion, a waiver of the objection. The item was thereupon allowed, and is now a matter *res judicata*.

Ford, J. concurred.

Wood, J. There can be no doubt the matter is *res judicata*. The plaintiff goes through the various steps of the first action, and the points raised therein could have been determined. The parties submitted this very point in the first action, and an adverse judgment was given thereon, as regards the plaintiff. How that judgment was given, we need not enquire. It is sufficient that such a judgment was given, and while it is outstanding, it affords a complete answer to this action.

Judgment affirmed. Appeal dismissed with costs.

8th April 1885. The defendant's appeal was this day heard.

Drew, for appellant. The Court having held the plaintiff's claim as regards the item for \$4,414.83, is *res judicata*, has constructively decided the present question. The accounts

SIDGEMAN, were gone into with reference to this item of \$655.95; the
 C. J. defendant was cross-examined on it, the matter discussed
 FORD & J. J. and sifted, and the item allowed by the Registrar. He made
 WOOD, 1884. his report, allowing the item to the defendant, and no ex-
 ception was taken to that report in respect of this item,
 and the report was, in that respect, confirmed. After that,
 SHEDDEN- it is impossible to say the matter is not *res judicata*. But
 BRUMCHETTY the plaintiff is also debarred from recovering this item on
 v. another ground. By suing the defendant for balance of accounts,
 ADAGAPPA with the knowledge of the facts, the plaintiff has ratified the act
 CHETTY. of the defendant; but if not, by so suing, he has certainly ratified
 the act, by taking up the judgment defendant recovered against
 Dorasawmy, and levying execution thereon, and receiving the
 proceeds thereof. *Wilson v. Poulter*, 2 Str. 859; *Story on Agency*,
 § 259; *Russell on Agency*, 22; *Smith v. Cologan*, 2 T. R. 189; notes
 to *Smith v. Hodson*, 2 Sm. L. C. 132, citing *Smith v. Baker*, 8.
 L. R. C. P. 350, 357, per Honyman J. The plaintiff is, in truth,
 blowing hot and cold. He also referred to *Brewer v. Sparrow*, 7
 B. & C. 310.

Donaldson for respondent. The plaintiff did not in the first
 action make any objection to this item, and so raised no issue
 which could have been determined. He here seeks to recover that
 which was not necessarily recoverable in the first action. As
 regards the alleged ratification, the cases are not on all fours with
 the present—they were not cases of principal and agent.

Wood, J. I am of opinion that the right of action in this
 second action for the \$655, is answered by the defence of *res judicata*.
 The first suit so far as this item is concerned, covers the same
 ground as the second action, and the matter being disposed of in
 the first action, is disposed of for good. There is only one ques-
 tion in the matter,—does the suit in equity, cover the ground of
 this action,—was the matter of this item in the second action, the
 subject of enquiry, investigation and decision, in the first? Unless
 I misunderstand entirely the character of a suit for an account,—
 the whole matter of the account is submitted to the Registrar, who
 has to go through it, item by item, with a view in conformity with
 the terms of the prayer, of deciding what is due from one party
 to the other, which can only be, by seeing whether the several
 items are to be upheld as constituting a money claim by one or
 the other party against the other, however intricate and involved
 may be the grounds of objection—subsequently when the report is
 confirmed, the judgment is the judgment of the Court.

On the second point, though not by any means satisfied of the
 justness of the law in such a case as this, I incline to the authority
 of the cases cited, *Smith v. Poulter*, and *Smith v. Baker*, which
 seem to establish the principle, that a person availing himself of
 the advantage gained by a transaction, *to ever so small an extent*,
 is bound to admit the propriety of the act. Here, no doubt, the
 question is between principal and agent; but the *ratio decidendi*
 would seem to be exactly applicable. I am of opinion, therefore,
 that this appeal should be allowed, and the judgment of the Court
 below, so far as it is here appealed against, reversed.

Sidgreaves, C. J. It is no doubt for the public good that there should be an end once for all, to all litigation; but at the same time, we must not carry out the doctrine of *res judicata* too far. It appears to me, we would be so doing, if we were now to reverse the judgment of the Court below. In *Nelson v. Couch* [suprà] Willes, J. says:—

“The plea sets up the exception of *res judicata*, and, therefore, must shew either an actual merger or that the same point has already been decided between the parties. This, I apprehend, is clear from the authority of Comyn's Digest, *action* [K. I.], and the following divisions. But it is unnecessary to refer to the ancient authorities, further than to say that they are entirely consistent with the modern ones, as well as with the rule of the Civil Law. Where the cause of action is the same, and the plaintiff *has had an opportunity* in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action. To constitute such former recovery a bar, however, it must be shewn that the plaintiff *had an opportunity of recovering, and but for his own fault might have recovered*, in the former suit that which he seeks to recover in the second action, [p. 108 *et seq.*]

Now, it is not clear here, that the plaintiff had ever raised an objection to the item, or had an opportunity of contesting the correctness of it. It was rather assumed to be correct, as the plaintiff had said nothing about it. In the other appeal, he distinctly raised the objection and then of his own fault, abandoned it. I think that makes all the difference between the two cases. This is not a matter of *res judicata* in its strict sense. As regards the alleged ratification, I do not consider the acts relied on amount to such. In my opinion, the judgment of the Court below was correct, and the appeal should be dismissed.

Ford, J. I see no reasons for altering the opinion I formed on this question in the Court below. There was certainly reasonable ground for bringing this second suit, as it is not denied as to facts; the defendant simply relies on *res judicata*. The matter in the first action however, was not fully tried, and the plaintiff cannot be said to have had a proper opportunity of raising it. The only points brought before the Court and Registrar, were matters of pure account; not the misfeasance here complained of. I think that is how the last appeal is distinguishable from the present. The acts relied on as a ratification, do not amount to a condonation of, or assent to, the act of the defendant in making the loan to Dorasawmy. The majority of this Court agreeing with the judgment of the Court below, that judgment will be affirmed, and this appeal dismissed, with costs.

Appeal dismissed with costs.

MARKWALD & Co. v. McALISTER & Co.

The maxim *caveat emptor* admits of no exception by implied warranty, in cases of sale of specific goods which are in existence, and which the purchaser had inspection of, before concluding his purchase.

The case of *Randall v. Newson*, 2 L. R. Q. B. Div. 102 has not altered the law in this respect; and applies only to cases where a purchaser not only buys the article for a particular purpose and communicates that purpose and object to the vendor, but relies on the skill and judgment of the seller to supply what is wanted without exercising his own judgment thereupon.

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Randall v. Newson [supra] and *Brown v. Edgington*, 2 M. & G. 279, observed on.

Semble. It is not yet decided law, that there is no difference between an ordinary vendor and a manufacturer, touching sales of goods on implied warranty.

Action for breach of warranty. The facts and arguments of Counsel are sufficiently noticed in the judgment so as to require no statement here.

Donaldson for Plaintiffs.

Davidson for Defendants.

Cur. Adv. Vult.

On this day judgment was delivered by

Ford, Ag. C. J. This was a case to try the question whether the defendants were liable in damages for the breaking of the iron hook of a block which they had sold by their foreman or shopman to the plaintiff under circumstances which I shall shortly have to go through. But before doing so, I think it desirable to state as clearly as I can what I take to be the law as to implied warranty arising on the sale and purchase of chattels. After careful consideration of the authorities, I quite adopt the law as stated in the text of Mr. Benjamin's well known work on *Sales of Personal Property* at page 633. As far as an ascertained specific chattel, *already existing*, and *which the buyer has inspected*, is concerned, the rule of *caveat emptor* admits of no exception by implied warranty of quality. The words in italics are so printed in the book. This seems to me to be the law, on the authorities. The learned Counsel for the plaintiffs says that there is an exception when articles are bought for a particular purpose communicated to the vendor, and he cites in support of that contention the case of *Randall v. Newson* [2 Q. B. D. 102, C. A.], to which I shall presently refer, as creating the exception. Now, Mr. Benjamin at pages 652 and 653 refers both to this case and to its circumstances, which the Counsel for the Plaintiff considers an exception to the rule. Mr. Benjamin lays down the so-called exception in these terms: "If a man by an article for a particular purpose made known to the seller at the time of the contract, and rely upon the skill or the judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the desired purpose, *aliter* if the buyer purchase on his own judgment," and he refers to the case of *Randall v. Newson*. But he certainly does not refer to it as any exception to the rule as laid down by him on page 633, nor does he refer to it as contradicting or interfering with the proposition he lays down at page 652, in case the chattel is required for a particular purpose. I am certainly of opinion, after careful study of the cases, that he is right, and that the case does not alter the law as laid down by him on the previous pages. The words of the Judges in the form of general propositions must not be too often taken to extend beyond the circumstances of the case they are deciding, and this should be borne in mind in reading *Randall v. Newson*, where expressions of the Judges taken without reference to the facts of the case might have a more extended meaning than, when read with those circumstances, they would properly have. It is curious that

in this case there was no inspection, and reliance was placed on the skill and judgment of the seller. The Plaintiff ordered a pole from his own coach-builder, relying on him, and had no inspection. So the case does not, therefore, create an exception to the first rule in Mr. Benjamin's work at page 633; and the pole being ordered from a manufacturer, a man whose trade and business it is to make it, there is naturally a strong and perhaps absolute reliance upon the skill and judgment of the seller.

The case therefore of *Randall v. Newson* does not, in my opinion, alter the law from what it was before, and as stated in the text book noticed.

I should like also to refer to *Brown v. Edgington*, 2 M. & G. 279, a case referred to by the Counsel for the plaintiff, and strongly relied on by him. I am desirous to call attention to the remarks of Mr. Justice Blackburn [now Lord Blackburn] on that case in the case of *Readhead v. Midland Railway Company*, L. R. 2 Q. B. 412, upon this very point. The point to which I am now referring has no direct reference to whether the agreement is a contract to carry or a contract to sell. But Lord Blackburn states the result of *Brown v. Edgington* in language if not identical with, still wholly to the same effect as, the proposition of Mr. Benjamin. He says: "The principle which I understand to be laid down in *Brown v. Edgington* is this,—that where one party to a contract engages to select and supply an article for a particular purpose, and the other party has nothing to do with the selection, but relies entirely on the party who supplies it, it is to be taken as part of the contract implied by law that the supplier warrants the reasonable sufficiency of the article for the purpose." Now it is perfectly true that some of the Judges in *Brown v. Edgington*, did state that there was no distinction to be drawn between a seller and a manufacturer; but I adopt Mr. Benjamin's observations upon that case exactly as he has written them. It does not seem to me to be yet decided law, and the dicta were not required for the circumstances of the case; and I think Mr. Benjamin himself seems to take that view of the observations of some of the Judges. He says, "In *Brown v. Edgington*, the Judges all intimated that there was no difference in the case of a sale by a manufacturer or any other vendor in such cases, but the point was not necessary to the decision of the Court, for the vendor had undertaken to have the goods manufactured for the purpose required by the buyer," evidently suggesting that this is a point not absolutely decided. And I confess it seems to me on reasonable and rational grounds that the distinction may often be well drawn. A person buying goods of a mere vendor of goods who purchases from other parties, cannot rely quite upon the skill and knowledge of the vendor, as he could on that of the manufacturer. This point is, however, outside the facts of this case, but I refer to it only in reply to the view expressed by the Counsel for the plaintiff, that there is no distinction between a sale by a manufacturer, and one by a shop-keeper. If the position of the latter is such as to imply reliance on his skill, that proposition may be true, but I can imagine circumstances where

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this would not be the case. There is at first sight also what might appear to be an exception to the rule first laid down by Mr. Benjamin in the class of cases in which *Josling v. Kingsford*, 32 L. J. C. P. 94 is one—the oxalic acid case—but it has always been distinguished in this way. It was said that the buyer never got oxalic acid at all. He ordered oxalic acid, and he got a different kind of acid, different in character. If in the case this plaintiff had purchased a 6 ton block, and got for example, a coil of rope, this would be result such as was nearly taking place in *Josling v. Kingsford*. But such is not the result of the evidence in this case. You must get something which fairly answers the description in the contract. Here the order was for a 6 ton block, and the plaintiff got what has been shown to be a merchantable article known as a 6 ton block.

That being, as I conceive it, the state of the authorities, the law is not, I think, altered by *Randall v. Newson*. We have now to apply it to the fact of the case itself, and in arriving at a conclusion as to what these facts are, I have thought the evidence of the Captain can be well relied on. There is some variation on the question whether he and the defendant's salesman went over together to Messrs. Lyon's office, or not, but I do not know that the fact is material one way or the other. I place more reliance upon the Captain's account, and he says that he went to the defendants' shop and saw Basagoiti, a salesman, and said he 'wanted a pair of good strong blocks, three sheaves and two sheaves for lifting heavy machinery.' He did not ask then for anything to lift a specified weight. The salesman said there were none in the store, but he knew where he could 'get them.' On the same day two blocks were brought into the store, and were shewn to him, the salesman telling him they were 4-ton blocks, able to lift 4 tons; words not amounting clearly to any express warranty. The Captain said, 'they were not suitable as he had one piece of machinery weighing five tons.' I call attention to these words because they seem to refer to the purpose for which they were ordered. The salesman said he knew there was another pair of blocks in the same place he got them from, and he could get them, able to lift 6 tons, but he could not procure them that day, and said 'it would be time to see them the next day,—to see them—no purchase or sale had taken place up to this time, what took place amounted to little more than a talk about what was wanted. The next day the Captain says he called again on purpose to see the blocks, the clear object being inspection. The defendants' agent then said 'Here are the 6 ton blocks' and pointed to the blocks subsequently purchased. 'I thought,' says the Captain 'they were really 6 ton blocks and judged partly knowing, and said they are just the pair I want,' and he bought them.

The plaintiff not only inspected the blocks, but he relied on his own judgment. It was not perhaps so perfect a judgment as he could have wished, but he exercised it as far as he had it. He says that he judged 'partly knowing.' A ship-Captain naturally knows something about blocks, though not as much, as per-

haps a maker of them, but he may know as much or nearly so, as a ship-chandler selling them.

I gather from the Captain's own relation of facts that the case falls within the first rule referred to by Mr. Benjamin. It was a particular ascertained chattel, already existing, of which the buyer had inspection. And I am also of opinion it cannot be classed under the other class of cases which the Counsel for the plaintiff has referred to, because there is no evidence that the plaintiff relied upon the skill and judgment of the seller to supply what he wanted, but exercised his own.

I might of course conclude my judgment here; but take the supposition that the plaintiff's view of the law is correct, and that the state of the law is, as he supposes, that the purchase of an article for a particular purpose only, implies a warranty, irrespective of inspection or reliance on skill, or judgment.

The first question would be, supposing the plaintiff to have purchased for a particular object, was his purpose not fulfilled? He had some ice machinery in his vessel, which he was desirous to have strong blocks to discharge at Bangkok, especially he says, *one piece of five tons*. So far as the machinery in his vessel at the time is concerned, and for which the contract was made, there is nothing to show it was unfulfilled. He communicated his object to the seller, and he admits that he lifted with these blocks parts of the machinery of 3 to 4 tons weight; and not until two months afterwards, with a different cargo and different machinery, when the blocks were used again for heavy weights; when after raising one piece of 4 tons, a second weight of four tons broke, it is said, the hook of the block. So that this occurred two months after the particular object for which he had bought the blocks, and they did serve him well up to that time. It is clear he took out all he wanted to take out with the blocks, the machinery he wished to lift when he bought them. Would it not be going too far to say that the particular purpose known to him and the vendor was to lift five or six tons at all times, places, and dates? I confess that I think that it would.

But suppose the opposite is the case, and the particular purpose can be carried on to this length of time. Supposing the case of *Randall v. Newson* puts the law on the basis which Mr. Donaldson contends for—was the block reasonably fit for the purpose it was intended for? To arrive at what is 'reasonably fit,' I must consider all the circumstances of the case; not only the object for which the block was required, but the nature of the article and its reputation amongst those who are in the habit of using it. It is well known that a certain material is liable to unexpected or unexplained accidents, not due to badness or flaw in the material, but due to influences of climate or some unknown causes; this element ought to be borne in mind in judging whether the article is reasonably fit or not. As to the particular character of this block, in some respects there is contrary evidence, but in this respect there is none. The Captain himself says that in lifting heavy weights there is risk, and in answer to a question why this was, he said 'iron was independable' meaning, I

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suppose, that it was not to be depended upon ; that only a certain amount of reliance could be put on an iron block even of the best. This view is confirmed by one witness for the plaintiff [Mr. Fletcher] who said he had much experience in hook blocks and said, " I don't approve of them ; I never use them for heavy work ; the hook constantly opens out, or if iron is bad it will break," so that, there is, to start with, a certain unreliability in iron hook blocks.

Now, if there was evidence that there was anything in the iron itself which was defective, or substantially defective in its manufacture, of course this consideration would be of little moment, but I am satisfied that there is no reliable evidence that this was so. There is no dispute that this iron was good, all witnesses so spoke of it. Even Mr. Cargill, who was the strongest evidence for the plaintiffs, said that it was good iron, but might be considered insufficiently good for the purpose. One other of the plaintiffs' witnesses said it was not Bowling iron, a particular class of iron considered best for some purposes. As to a flaw in the iron, in its workmanship, none was shewn. The evidence on which it was said to be faulty was an inference from a fact that for 3/8ths of an inch the breakage was acute, and on this the plaintiff relied that the hook was badly made.

Now the evidence on the other side is decidedly against this view, and I place a great deal of reliance on one of the witnesses [Mr Miller] because he seemed to me to be well acquainted with the subject, and, from the way he gave his evidence, to know a good deal more, and to have more direct experience of iron manufacture and iron-work than any other witness, and he distinctly says that if the effect shown had been produced in the way Mr. Cargill says it had, he would have known it, and would have seen whether the iron had been over-heated or over-hammered. He also distinctly says that he has seen the best iron break and fracture and tear in the way this hook represents. The block was made by a first rate maker, so acknowledged to be by the plaintiffs' witnesses, and looking at the fact that unsatisfactory evidence is given of any latent defect in its manufacture, I think the safer conclusion is, that by some means not before the Court, the iron gave way. It was within the purview of the plaintiffs' thoughts that iron blocks were not always to be depended upon—'independable.' He has so stated his view, and I do not think he could, even were the case to be decided on the narrower basis to which I am now confining it, altogether complain because his fear has in this instance been verified. For these reasons, and on all grounds, I have given, my judgment must be for defendants.

EBRAHIM v. SHAIK ALLY & ORS.

PERANG.
—
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1884.
—
November 7.

A person who comes by goods of another by accident or mistake, is liable for gross negligence in keeping the goods ; but the damages recoverable against him, are only to the extent of the then plaintiff's interest in the goods

Where therefore the defendants' lightermen, by mistake or accident took delivery of certain goods which they conveyed in their boat, but owing to the unseaworthy condition of the boat, the goods were damaged and rendered wholly useless,

Held, the plaintiffs, the proper lightermen for those goods, were entitled to maintain an action against, and recover damages from, the defendants, but only to the extent of the loss of the hire they would have earned, had they lightered the goods.

The owner of the goods had, in a previous action, on the evidence then adduced before the Court, recovered as damages from the plaintiff, the proper lightermen, the value of the goods so damaged as aforesaid, which damages, together with the cost of that action, the plaintiff paid. The plaintiff, the proper lighterman, then sued the defendants to recover as damages, the value of the goods, or the full amount, with costs, he had had to pay,

Held, the plaintiff could not recover.

Where a case is a fit one to be tried in this Court, the plaintiff, although he eventually therein recovers a sum within the jurisdiction of the Court of Requests, will not be deprived of his costs as in an ordinary suit in this Court.

Action to recover \$170 damages for the negligent carriage by the defendant of 30 bags of rice from the *S. S. Perulia* to the Jetty, whereby the rice was damaged and rendered of no use to the plaintiff, and for further and other relief. The defendants, in their statement of defence, denied they made any contract with the plaintiff for the carriage of the rice, and further denied they carried the goods for the plaintiff. From the evidence it appeared, that the *S. S. Perulia* arrived at Penang on the 11th January 1884, with 690 bags of rice belonging to Wo Seng & Co., and they thereupon engaged the plaintiff to take his boats alongside the steamer and take delivery of the rice, at 2 cents per bag. The plaintiff accordingly sent his boats, but was not able to obtain delivery that day, and was told by the people on board, to return the following morning. The following morning, the plaintiff's boats set out for the steamer, but when they got close by, they found the defendants' boat pulling off, laden with a certain number of bags of rice. On reaching the steamer, they obtained delivery of only 370 bags for Wo Seng and Co., which they safely landed and delivered over to the latter. The plaintiff then found that among the bags brought by the defendants' boat as aforesaid, were the remaining 120 bags of Wo Seng and Co., but 30 of these bags however, owing to the leaky and unseaworthy condition of the defendants' boat, were damaged by sea water and rendered of no practical use. Wo Seng and Co., refused to take delivery of these 30 bags, and sued the plaintiff in damages for negligence in their carriage. The plaintiff defended the action, and called evidence [among others the present defendant Shaik Ally] to shew that the bags were not damaged in his boat, but in that of the said Shaik Ally. Wo Seng and Co., however maintained it was in the plaintiff's boat, and the Court adopting, on the evidence, this latter conclusion, on the 30th April 1884, gave Wo Seng and Co., a verdict for \$120, and costs. The plaintiff subsequently paid Wo Seng and Co., this amount and costs, amounting to \$170 in all, which he now sought to recover from the defendants. Both in the action by Wo. Seng and Co., as also in the present one, it was shewn or admitted, that there was no contract between the plaintiff and defendants, that the latter should carry these 120 bags,—the plaintiff had never requested the defendants to do so,—not until after the 30 bags had been found to be damaged, did he know the defendants were carrying them. Wo Seng and Co., refused to pay plaintiff for the carriage of the rice, and

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plaintiff as a fact, never got payment therefor. It also appeared in this case, that the defendants—having a contract with Messrs. Liebert & Co., the agents of the S. S. *Perulia*, to go and receive all her cargo for this port, for which no special tongkangs were sent by consignees,—had, on the day of the arrival of the steamer, as well as the next day, gone alongside for such cargo; that on the day in question, [the second day] the officer on board,—mistaking the defendants boat, as one of the plaintiff's boats that had come for the rice the previous evening, had, along with other cargo [rice &c.] placed on board defendants' boat the said 120 bags of Wo Seng & Co. The defendants were not aware they were Wo Seng's until after the 30 bags had been landed and found damaged; up till then, they were under the idea they were conveying general cargo for Liebert & Co. At the trial, the plaintiff's claim was amended by adding a claim for money paid, and money had and received, in order, if possible, to enable plaintiff to recover the amount [\$170] he had had to pay Wo Seng and Co., as aforesaid.

G. H. S. *Gottlieb* for the plaintiff, contended that this action was maintainable by the plaintiff against the defendants, and the plaintiff was entitled to recover the full amount paid by him, and referred to *Brown v. Hodgson*, 4 Taunt 189; *Spencer v. Parry*, 3 A & E. 331, 338, and *Chitty on Cont.* [10th ed.] 400, note c, 551.

Van Someren for defendants contended that the action did not lie, as there was no privity of contract between the plaintiff and defendants, nor any duty cast on the latter, as regarded the former, and cited *Addison on Torts*, p. 18,956, *Duton v. Powles*, 30 L.J. Q. B. N. S. 169, on appeal 31 L. J. Q. B. N. S. 191, *Alton v. Midland Railway Co.*, 34 L. J. C. P. 292; *Buchanan v. Kirby* [a], *Tanner v. Scovell*, 14 M. & W. 28, 34-35, per Parke B. *in arguendo*, *Story on Bailments*, § § 80-82, & §. 215.

Gottlieb in reply.

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18th February, 1885. *Wood J.* In this case, the defendants by accident and mistake have, by their servants, and agents, taken goods which ought to have been lightered and landed by the plaintiff from a ship, and before knowing their mistake the goods were damaged by their negligence, which in this case I find, as matter of fact, to be gross negligence, as evincing want of that reasonable care which may be properly expected from a man lightering goods.

I hold that under such circumstances, such a person is liable for gross negligence, as he would be if he had come by the goods by finding, or as a depositary generally—see the notes to *Coggs v. Bernard*, 1. Sm. L. C. 224, on the subject of "Depositum," and the authorities there cited.

In such a case, if goods are damaged or lost, the person in fault is bound to pay damages to the several parties interested in

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the goods, to an amount equal to the damage or loss sustained by the persons interested in the property, according to their several interests.

The plaintiff in this case, was not the owner of the goods but the goods were really owned by one Wo Seng: the plaintiff's sole interest in the things lost being that of a carrier who, if he had carried the goods as he had contracted to do, would have earned 2 cents a bag on the whole quantity carried by the defendants for him,—[this would amount to \$2.40]—while the real owner Wo Seng, would be entitled to the value of the articles lost, less the cost of carriage.

The case however, is complicated by this fact. Wo Seng, the owner of the goods, in a previous action, sued the plaintiff for the loss of his goods; and on the evidence offered to the Court on that occasion, he did in fact recover against the then defendant, the present plaintiff, the value of the goods. The present plaintiff now seeks to recover against the present defendants, the amount which he has *de facto* lost by the adverse verdict in the former case, and my doubt has been, whether or not I could award him this amount as damages, my sympathy, is undoubtedly with him, and it seems reasonable, now that it is clearly shewn that the defendants, and not he, were in fault, that he should receive that amount,—but I expressed at the trial, a fear that such a view of the case, was untenable, and that I should be obliged to decide in the case before me, in accordance with the facts as they now appeared; and that the plaintiff's success or non-success in some previous action, on the facts as they then appeared, was a matter which was to be lamented, but could not now be helped.

After much delay in trying to find authorities which might guide me in the matter, and finding none, I am compelled to revert to my original opinion, though I must confess, in view of the extended jurisdiction which this Court possesses in matters of mixed law and equity, with some confusion of ideas as to the process of reasoning whereby that conclusion is arrived at.

That the defendant ought fairly to pay the amount, at least of the value of the goods lost by his neglect, and paid for by the plaintiff, though without the costs, I think is reasonable, but if he refuses to do so, I cannot see my way to help the present plaintiff, who, it must be taken, should have shewn the existing facts in the action brought by Wo Seng against him. There will therefore be judgment for the plaintiff for \$2.40, with costs.

Van Someren thereupon asked, that the costs should only be according to the scale of fees allowed in the Court of Requests.

Wood J. intimated, that as the point raised by the case was a fit one for this Court, he saw no reason to deprive the plaintiff of his costs, as in an ordinary suit.

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ACCOUNTS—On reference of the accounts in a partnership suit, to the Registrar for enquiry and report, it is incumbent on him, on such materials as are before him, and to the best of his ability, to find definitely on the several items in the account and to make up an account shewing how the partners stand in respect to each other. Finality in such report is essential. Where therefore the partnership books were lost and each party brought in his account made up from memory, but the Registrar being dissatisfied with the evidence and accounts of both parties, in his report—stated, he could make nothing of the accounts, and recommended the plaintiffs should be nonsuited. On exceptions to such report, the Court allowed the exceptions, and referred the accounts back to the Registrar for a definite and final report, but ordered the costs of the exceptions to be costs in the cause. *CHIN GUAN TAK & ORS. v. CHIN SEAH POW* 586

2. —Where the Registrar has definitely dealt with matters of account referred to him, and made findings thereon, the Court will not readily disallow such report, on the assertion—or even on the admission of the parties, and proof—that any one or a few particular items in such report, are unsupported by proofs to be found on his notes of evidence, and is at variance with the story told by both parties. Therefore, where both parties were agreed, that a particular promissory note was given in settlement of accounts, and the only question between them was the settlement of that account—but the Registrar disbelieving both these statements, found that the note was given for actual advances by the one party to the other,—*Held*, the report should not be disturbed, and the exceptions filed thereto on that ground, were overruled. *VELLIAN v. KADAPAH CHETTY & ANOR.* 638

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<i>see</i> CONTEMPT OF COURT. 2.	
14 of 1852 s. 2	438
<i>see</i> AWARD. 2.	
2 of 1855, ss. 21 & 23	520
<i>see</i> EVIDENCE 4.	
13 of 1856, ss. 86, 102	254
<i>see</i> TRESPASS. 2.	
— s. 112	131
<i>see</i> NOTICE BEFORE ACTION.	
14 of 1856	561
<i>see</i> ROADS AND BRIDGES.	
— s. 126	470
<i>see</i> NOTICE OF ACTION. 1.	
25 of 1856, s. 10	587
<i>see</i> ASSESSMENT. 3.	
1 of 1859, s. 22	186
<i>see</i> PUBLIC OFFICER. 1.	
14 of 1859	214,392
<i>see</i> PART PAYMENT. 1. 2.	
<i>see</i> AMENDMENT	513
<i>see</i> EJECTMENT. 1.	242
— s. 1 cl. 2, 9	479
<i>see</i> SERVANT.	
— s. 1 cl. 12	386
<i>see</i> IMMOVABLE PROPERTY.	
— s. 1 cl. 12	624
<i>see</i> EJECTMENT. 3.	
— s. 1 cl. 16	472
<i>see</i> ATTORNEY.	
— s. 2	580
<i>see</i> WAKOFF. 3.	
— sub. s. 9 cl. 1	453
<i>see</i> GOODS. 5.	
— s. 13	536
<i>see</i> FOREIGN BILL.	
— s. 15	652
<i>see</i> LAND. 10.	
48 of 1860, ss. 22, 29	254
<i>see</i> TRESPASS. 2.	
— s. 29	273
<i>see</i> MALICE. 1.	
26 of 1861	303
<i>see</i> LAND. 6.	
5 of 1866	354
<i>see</i> ARREST BEFORE JUDGMENT.	
29 of 1866, s. 20	205
<i>see</i> CONTEMPT OF COURT. 2.	

ADMINISTRATION—The plaintiff claiming to be one Pah Jusoh, commenced proceedings in the Ecclesiastical Court, seeking the revocation of Letters of Administration granted to the defendant, Meh Keechee, to the estate of Pah Jusoh, deceased, on the grounds that Pah Jusoh was himself, and was alive: the object of the application was, to obtain possession of certain title deeds of Pah Jusoh in the defendants' hands, and to establish his title, as "Pah Jusoh," to the lands therein comprised. The plaintiff, when the matter was ripe for hearing, abandoned these proceedings, and commenced an action, on the Civil side, in ejectment, to recover possession of such lands from the defendants: he based his title to these lands, firstly as being Pah Jusoh the person mentioned in the title deeds, and secondly as having been in long and uninterrupted possession thereof. He did not pay the defendant, her costs in his abandoned Ecclesiastical proceedings, and the defendants now applied for a stay of proceedings in this action, until such costs were paid.—*Held*, that this action was more comprehensive in its nature, and included some matters not included in the Ecclesiastical proceedings. The two proceedings were therefore not substantially for the same causes of action, and a stay of proceedings was refused. **PAH JUSOH v. MEH KEECHEE & ANOR.** 601

2.—Revocation of Letters of, —right to sue 624

see EJECTMENT. 3.

ADMINISTRATION BOND—An administration bond to a former Judge of the division of the Supreme Court, cannot be enforced in the name of the Judge presiding in that Settlement. Such latter Judge is not a "successor" of the Judge of the division. The proper remedy in such a case is to have the bond assigned by such former Judge, or his legal personal representatives. Demurrers should be brought forward by way of motion for judgment, under the Civil Procedure Ordinance 1873.—*Semble*. The Court of Probate Act [1857] 20 & 21 Vict. c. 77. does not apply to the Straits. **ALLEE v. SAMAN & ANOR.** 480

ADMINISTRATOR—A person who is administrator of a deceased person, is entitled to recover possession of title deeds belonging to such deceased, from another with whom they may have been deposited, although such deposit may have been for valuable consideration, and made by such person who is administrator, or as a next-of-kin, jointly with other next of kin, but before he has obtained administration to the estate of such deceased. Such a deposit affords no defence, either at law or

ADMINISTRATOR—continued.

equity, to a claim by such person depositing, when he has clothed himself with the title of administrator, by obtaining Letters of Administration. **ABDULRAHIM v. DRAHMAN & ANOR.** . . . 171

2. — *Semble.* An administrator will be allowed to sue in *formâ pauperis*, on an affidavit that there are no funds belonging to the estate wherewith to carry on a suit. The words "in his own right," in section 459 of the Civil Procedure Ordinance 5 of 1878, does not deprive him of this right. **KYSHE v. INCHE NAP PENDEK & ORS.** 602

ADOPTED SON—This Court will not recognize the right of an adopted son to share in an intestate's estate. **KHOO TIANG BEE ET UXOR v. TAN BENG GWAT** . 413

ADVERTISEMENT—in English—no notice to a Chinaman unable to read that language . . . 364

see COVENANT. 1.

ADVOCATE AND SOLICITOR—Pleadings—insult . . . 4

see CONTEMPT OF COURT 1.

2. —Notice on behalf of client demanding delivery of goods . . . 184
see GOODS. 3.

3. —Admission Fee under Order-in-Council, 6th March 1868 . . . 222

see FEES.

4. —A person under twenty-one years of age, will be permitted to be examined, as to his fitness to be a Solicitor, although he will not be admitted to practice before that age.—*Query.* What, if there be special circumstances which make it beneficial for him to be admitted before attaining twenty-one?—*Semble.* The mere fact, that an Ordinance is likely to come into operation, whereby, he will be kept back for eighteen months, or thereabouts, is not such a special circumstance, as will cause the Court to allow him to be admitted. *In re Van Someren* . . . 363

5. —The provisions of section 37 of the Court's Ordinance 5 of 1873, are imperative on every Solicitor to take out his annual certificate, and as no remedy is provided by the Ordinance for the non-observance of this section, and the Crown has a pecuniary interest thereunder, by reason of the Stamp Duty imposed, the Attorney-General may sue for same, under the Crown Suits Ordinance 15 of 1876. **ATTORNEY-GENERAL v. GREGORY ANTHONY** . 473

AFFAIRS OF STATE—Production in evidence of documents relating to, . . . 520
see EVIDENCE. 4.

AFFIDAVIT—Affidavits, filed with bills of sale, under section 18 of Ordinance 22 of

AFFIDAVIT—continued.

1870, must be construed with strictness. The omission to describe the occupation of a grantor of the bill of sale, renders it void, under the section aforesaid, against an execution creditor. An affidavit filed along with a bill of sale, executed by two grantors, stated that, "the grantors *reside* in Bridge Street, and *is* a trader,"—*Held*, the description was defective, as being ambiguous as to which of the grantors was referred to, and not being a description of both. **MEYAPPA CHETTY v. KHOO BEAN TEEN & ORS.** . . . 510

2. —Defendant having been arrested on an order of arrest, granted on affidavits of two deponents, to which there was only one jurat attached, which was to the effect that it was sworn to by the "deponent" [in the singular].—*Held*, a fatal defect; and the order was set aside. **KWAH CHAN CHEW v. WEE ENG SUK** . . . 519

AGENT—Power to substitute or of nominee to sue . . . 472

see ATTORNEY.

—Purchaser—binding contract . . . 542
see AUCTIONEER. 1.

—Notice affecting Principal . . . 571
see NOTICE ACQUIRED.

—Principal—communication of knowledge—fraud . . . 619

see KNOWLEDGE. 3.

AGREEMENT—Where the defendants offered the plaintiff the post of "Law Agent to the Company," and the plaintiff accepted the offer, subject to a guarantee being given for his continuance in the office, and in reply the defendants wrote him, that his appointment would be "subject to confirmation or otherwise, of the Court of Directors."—*Held*, that this reservation in favour of the Court of Directors, was not to be understood only as a power to be exercised at once, but also extended to their annulling the plaintiff's appointment at a future time, if its continuance became, in their opinion, undesirable. By the Charter of 1826, the Court of Judicature consisted of the Governor as President, the Recorder, and the Resident Councillors as Judges: the Recorder having been re-called, and the titles of "Governor" and "Resident Councillor" changed to those of "Resident" or "Commissioner," and "Deputy Resident."—*Held*, that the suspension of the Court by the local authorities during the period that this was so, was an unnecessary and improper act,—for the principal officer of the defendant Company, by whatever name called, was impliedly at liberty under the Charter, to act as head of the Court, and the principal

AGREEMENT—continued.

officer resident in the Settlement under him, to act as the third Judge; and that the title "Governor" and "Resident Councillor," in the Charter, was merely the official designation of those officers as then known, and a change of such their designation, did not prevent them from sitting as Judges of the Court.—*Held*, also that the suspension not being the legal and necessary consequence of the alteration in Government, but an unauthorized act of the local authorities, the plaintiff could not be deprived of his right to act as Law Agent of the Company, and was entitled therefore to recover the salary which he would have earned, had the local authorities not fallen into the error. The payment by the defendants to the plaintiff, of the amount of his judgment and costs, does not prevent the defendants afterwards appealing, against such judgment. *CAUNTEE v. EAST INDIA Co.* 12

2. —Absence of special,—agent—excess of authority—presumption in case of foreign merchant 85

see FOREIGN MERCHANT.

3. —Breach of,—implied undertaking 350

see BREACH OF AGREEMENT.

4. —An agreement made between two persons, each of whom was desirous of obtaining a certain contract, that they should not tender against each other; that one should do so, and if he got it, should hand same over to the other, in consideration of payment of a commission at a certain rate—but which contained no clause, making it obligatory on that other to make the tender, or restraining him from having a share, directly or indirectly, in the tender of anybody else—is not void for want of mutuality, or as being in restraint of trade. An agreement, the stamp of which is cancelled, under Ordinance 8 of 1873 with only the date, but not also with name or initials, is not "duly stamped" within the meaning of that Ordinance.—*Held*, by the Privy Council, however, [reversing the judgment of the majority of the Full Court of Appeal of the Colony] that the Collector had power under section 26 of the Ordinance, to rectify the omission. *VERNON ALLEN v. MEERA PULLAY & ORS.* 394

5. —To withdraw case for valuable consideration 430

see PLAINTIFF. 1.

6. —Where an agreement is made for the re-payment of money on the arrival of a certain ship at a certain port, and the voyage the vessel is to pursue, is clearly pointed out,—*Held*, her arrival at that port was a

AGREEMENT—continued.

condition precedent; and no re-payment could be required, although the vessel was unable through stress of weather and bankruptcy of her owner, to complete the voyage.—Such vessel having been sold on the bankruptcy of her owner, and the purchaser having repaired and re-fitted her, and sent her on his own account to the same port as that mentioned in the aforesaid agreement, but by a different route,—*Held*, the arrival of the vessel at such port, on such second voyage, was not a performance of the condition mentioned in the agreement, as it was a new voyage, and not the one contemplated by the agreement. *LETCHMAN CHETTY v. NARAINAN CHETTY* 467

ALIENATION—Restraint against—Equitable Estate 432

see GIFT. 3.

AMENDMENT—The Court allowed the defendant to amend his statement of defence, which had been filed and delivered, by adding thereto, a plea of the Statute of Limitations, but reserved leave to the defendant to appeal, considering the point not free from doubt. *Rolt v. Cox*, 2, Wilson 253, is not of present authority.—The words "real question in controversy between the parties," at end of section 184 of the Civil Procedure Ordinance 5 of 1873, mean, the right of the plaintiff to a cause of action at the time of the issuing of the writ of summons. *ABOOBAKARSAH v. AHAMAD JEL-LALOODIN* 513

ANNUAL VALUE—*see* ASSESSMENT.

APPEAL—Payment of judgment and costs, no bar to— 12

see AGREEMENT. 1.

—Court of—power to allow or direct amendment in title of suit 624

see EJECTMENT. 3.

—Court of,—power to review or vary order as to costs 647

see ACCOUNT STATED.

APPROPRIATION OF GOODS—In deciding whether there has been an appropriation of goods, so as to pass the property therein, the acts relied on must be not only clear, unequivocal and conclusive, but the test is, whether they amount to an actual and final election of the particular goods for that particular purpose. Where H. G. & Co., in consideration of certain advances to their home firm, by the plaintiff, purchased certain quantities of pepper which they placed in a store-room by itself, and thereafter engaged a ship to convey the said pepper home to the plaintiff, and wrote to their home firm expressing their intention of forwarding such pepper by the said ship to the plaintiff, but before they could ac-

APPROPRIATION OF GOODS—*contd.*

usually ship the same, they became bankrupt, and immediately thereupon wrote to the plaintiff expressing their intention to have forwarded the goods, but of their having been hindered by their general body of creditors from doing so, and the assignee of H. G. & Co., having sold the said pepper and received the proceeds of such sale.—*Held*, that there was no appropriation of the pepper to the use of the plaintiff, and although there was a present intention on the part of H. G. & Co., to forward to the plaintiff that particular pepper, yet there was still wanting that final and irrevocable act completing such appropriation, as the forwarding to the plaintiff of the Bill of Lading duly endorsed, on shipping the pepper on board the said ship, or the like. *ASHTON & ORS. v. BAUER & ORS.* . 164

ARBITRATION—Award—trust . 438
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— **Covenant** 497
see **AWARD.** 3.

— **Compensation — apportionment** . 544
see **LIFE ESTATE.**

ARREARS OF RENT—Right of Crown to distrain for,—Covenant . . 73
see **LAND.** 3.

ARREST—Release of prisoner from, on civil process by bailiff . . . 173
see **RELEASE FROM ARREST.**

— **Privilege from,—defendant going from one Settlement to another** . . . 509
see **PRIVILEGE FROM ARREST.**

— **Discharge from custody—fraud** . 539
see **WRIT OF ARREST.**

ARREST BEFORE JUDGMENT—A defendant in an action under Act V. of 1866, who has been arrested before judgment, is entitled to his discharge after the seven days time given by the Act has expired, although the plaintiff has not, and is unwilling to obtain judgment, and the order of arrest on which the defendant was arrested, authorised him to be arrested and kept in custody for six months, or till the further order of the Court.—MOOROGAPAH CHETTY v. LIM HONG & ANOR . . 354

ARTIFICIAL COURSE—Easement or right to flow of water 478
see **NOTICE OF ACTION.** 2.

ASSESSMENT—In rating Estates and Plantations in this Colony, for purposes of assessment, the terms “annual rent” and “annual value” in Acts 12 of 1839, and 12 of 1840, are synonymous terms, and the assessment can only be calculated on the annual *net* return of the property—Principles of rating property for purposes of as-

ASSESSMENT—*continued.*

assessment discussed.—EAST INDIA COMPANY v. SCOTT 51

2. —The appellant, the owner of extensive lands in the Settlement, rented a large portion of such land to tenants, and kept the remainder in his own occupation: he employed an agent to superintend the whole of these lands including those let out to tenants, and paid this agent \$6,000 a year. He claimed that this sum under Act IX. of 1848, should be deducted from the rent of the lands let, as well as from the value of the net produce of the lands in his own occupation.—*Held*, that no deductions could be made from the rent, as assessment was directed by s. 3, to be charged on the “actual rent,” but a reasonable portion of such sum, for the superintendence of the lands occupied by himself, should be deducted from the value of the gross produce of such lands.—The words “outlay actually paid and expended upon the land,” in the 5th section of the said Act mean, an expenditure which is of such a nature as will give value to the land, or is instrumental in producing the gross value; the assessment therefore paid on a house built on the land, and quit-rents paid to Government on the land, are neither of them items which can be properly deducted under that section, in order to ascertain the value of the net produce on which assessment is chargeable. Principles of rating discussed.—*BROWN v. MUNICIPAL COMMISSIONERS* 75

3. —It is proper, for the purposes of appealing, that the certificate of the fixing of a rate, should shew, on its face, the date it was made—but such date is not absolutely necessary under section 10 of the Act XXV. of 1856, and its absence does not invalidate the rate. Neither does the absence of authentication, by two Commissioners, of such rate, or any amendment thereof,—under section 10 aforesaid, invalidate it.—On an appeal, by a rate-payer, against a rate fixed by the Commissioners, the onus is on the commissioners to prove, both the rate and the reasonableness thereof, and it is for them to do so, before the appellant is called on to prove the unreasonableness thereof.—Managers, Engineers and others of an estate, are not “laborers” within section 23 of the Act XXV. of 1856, so as to entitle their dwellings to be exempted from rating, the section moreover, is merely permissive, and not directory, on the Commissioners.—In estimating “the gross annual value” under the Act XXV. of 1856, of an estate, carried on by the owners thereof, the Commissioners are entitled to estimate its annual value as an estate in the hands of a supposititious tenant of reasonable know-

ASSESSMENT—continued.

ledge and skill. Dicta as to estimating the annual value of houses in the town, for purposes of assessment. **VERMONT v. MUNICIPAL COMMISSIONERS** 587

ASSIGNMENT—Of stipend by public officer illegal 204

see **PUBLIC OFFICER. 2.**

ATTACHMENT—Title to goods—equitable mortgage 553

see **DEBTOR'S GOODS.**

ATTORNEY—An attorney or agent has no power to substitute another for himself, where the original power of attorney gives him no power to do so: the nominee of the attorney, under such circumstances, has therefore no right to sue in the name of the original principal. A letter from one person to another, directing the latter to demand or sue a third party, is a sufficient power to enable the latter to sue such third party in the name of the writer. The limitation applicable to a claim for hire or freight of a junk, under a charter-party which is in writing, but not under seal, is six years, under clause 16, section 1 of Act 14 of 1859. If a plaintiff recover in the Supreme Court a sum within the jurisdiction of the Court of Requests, he will—unless there are special circumstances to justify his suing in the Supreme Court—be allowed his costs only, according to the scale and practice of the Court of Requests.—See BONG LIM & ANOR. v. KAM BENG CHAN** 472**

ATTORNEY-GENERAL—Charity suit—necessary party 489

see **CHARITY. 3.**

— **On ex-parte application made plaintiff** 500

see **CHARITY. 4.**

AUCTIONEER—Where an auctioneer under a misapprehension of the real facts attending the sale, knocked down an article to a person he supposed to be the highest bidder, but after so doing he was made aware of the true state of things, whereupon he declined to enter the name of such supposed purchaser into his book, as the purchaser, or to make delivery of the goods to him.—*Held*, although the hammer was down, he was not the agent of the supposed purchaser, so as to be liable for not making a binding contract for him—nor was he liable for not making delivery of the goods. **HIN LEE & Co. v. COHEN 542**

2.—A memorandum in an Auctioneer's Book, setting out conditions of sale, at foot of which was his signature as auctioneer—and then setting out, in columns, the numbers of lots sold, measurements, name of purchaser, amount of purchase money, and

AUCTIONEER—continued.

signature of purchaser, in which last column, the purchaser signed his name opposite certain lots, but which did not give a description as to the locality of the lots, nor use words connecting the conditions of sale with the lots following.—*Held*, a sufficient memorandum, or contract in writing, within section 4 of the Statute of Frauds. A vendor cannot maintain an action against a purchaser for non-completion of the purchase, if it can be shewn that his title is open to serious question, and possible litigation with contiguous land-owners. Defendant purchased, at various prices, certain lots of land from the plaintiff, each lot being knocked down to him separately, whereupon he signed a memorandum of purchase against each lot, but subsequently declined to complete the purchase, as the plaintiff's title-deeds did not appear to contain the whole quantity of land put up by him in lots to auction, on the occasion in question, and also a large portion of the 28 lots purchased by him [defendant] was claimed by a contiguous land-holder. The exact quantity laid claim to, however, it was difficult to ascertain without litigation or a full survey of the District.—*Held*, that the plaintiff's title was faulty in a material point, and he could not therefore recover damages for the non-completion, by the defendant, of the purchase. **CHEAH TEK THYE v. HASSAN KUDUS** 654

AWARD—An award is not a public or a quasi-judicial document, which, if lost, must be proved only by producing a copy of it; but is the same as any other document, and can, if lost, be proved by parol evidence, or a copy, or a counterpart thereof, simply. The rule with regard to secondary evidence of an award, is the same as that with regard to a lost deed, or such like documents. **MYMOONAH v. HAJI MAHOMED ARIFF 353**

2.—An arbitrator who had made and signed his award, ready for delivery, is *functus officio*: and any subsequent alteration he may make is merely nugatory. An award, on a submission of all matters in difference, is no bar to the recovery of a demand, which existed as a claim at the time of the reference, but was not then a matter in difference. Section 2 of the Limitation Act XIV. of 1852, is more extensive than section 25 of the English Act 3 & 4, William IV. c. 27, which is expressly limited to *express* trusts.—*Semle*. Section 2 of the Act XIV. of 1852, applies to cases of *implied* and *constructive* trusts, as well as *express* trusts. An executor, who, in accordance with his testator's Will, takes

AWARD—continued.

possession of property which, by the Will, is devoted to certain special objects which are void in law, with the intention of so applying the property, but subsequently misappropriates the same—cannot, when he is sued, and the objects of the testator are sought to be declared illegal, and the property to be applied in payment of legacies or to the next-of-kin, plead the Statute of Limitation, although more than 12 years have elapsed, as there is an implied or constructive trust in favor of the legatee or next-of-kin, and the case falls within section 2 of the Limitation Act XIV. of 1852. Such a suit, is not a suit for a legacy, but one to compel the executor who has clothed himself with a trust, to account for breaches of trust. *Phillipo v. Munings*, 2 My. & Cr., 309, followed. **SYED AWAL BIN OMAR SHATREIF v. SYED ALI BIN OMAR AL JUNIED & ORS.** . . . 438

3.—The Opium Farmer by his contract with the Crown, under the Excise Ordinance IV. of 1870, covenants not to sell opium in the Settlement during the last three months of his exclusive privileges, at an under-rate. Several of the partners in the Penang Farm had shares in certain other farms in foreign adjoining territory—one at Perak and another at Kedah. The former farm was carried on under the same name as the Penang Farm—the latter was not, but that Farm and the Penang Farm had a common head-manager. The Perak Farm during the last few days of the exclusive privileges of the Penang Farm, sold opium in Perak territory, immediately next to Province Wellesley, to natives of Province Wellesley, below the usual rates, and so spoilt the Penang incoming Farmer's market in the Province. The common manager of the Penang and Kedah Farms had also exported several chests of opium from Penang to Kedah, there prepared the opium, and re-imported the same into Penang, and here sold them in the name of the Kedah Farm, at an under-rate, [at the same time as the Perak Farm was flooding the Province by their acts.] and so also flooded the Penang incoming Farmer's market in Penang. The incoming farmer having charged the outgoing farmer, before His Excellency the Governor, with breach of his contract generally, arbitrators were appointed in terms of the Ordinance, to enquire into the same and make their award. The majority of the arbitrators found these matters proved, and awarded a large sum to the new farmer accordingly. On the award being brought up by the old farmer into this Court, the same was set aside as being in

AWARD—continued.

excess of the arbitrators' jurisdiction.—*Held*, on appeal [modifying the judgment of the Court below,] that the award was rightly set aside as regarded the Perak Farm, as those acts, though injurious, and probably intentionally done, did not take place in this Settlement, but as regarded the Kedah Farm, the arbitrators might well have found, as in fact they did, that the acts were those of the Penang Farm, under the disguise of the Kedah Farm, and upheld their award in that respect. *In re ARBITRATION OF OPIUM FARMERS* . . . 497

BAILIFF—*see* **RELEASE FROM ARREST** 173
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BANKRUPT—Security for costs . . . 325
see **COSTS.** 4.

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BELIEF—Credible witness—facts imputing guilt . . . 629
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BEQUEST—License to live—direction by testatrix . . . 475
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———Real and personal property—residuary clause . . . 544
see **LIFE ESTATE.**

BILL—Holder of joint and several—knowledge acquired—principal—surety 455
see **PROMISSORY NOTE.** 3.

BILL OF LADING—Where by a Bill of lading it is provided, that "if necessary the goods are to be landed by the master or agent of the ship, at the risk and expense of the owners of the goods," and the necessity has arisen in the form of quick despatch being requisite to the ship, which may also be beneficial to the owners of the goods—the landing of such goods by a third party, with whom the owners of the goods have no special contract is to be construed as the landing by the master or agent of the ship, and the expenses of such landing, can only be received by the agents or master from the owners of the goods, and not from them by the lighter-men. The fact that the owners of the goods have, on previous occasions, paid the lighter-man direct, on Bill by which they are declared to be debtors to him, does not conclude them from afterwards disputing that liability to him, for subsequent lighterage. **NOORSAH BAWASAH MERICAN v. WM. HALL & CO.** . . . 640

BILL OF SALE—If a Bill of sale refers to a list of the articles assigned, but no copy of the list is registered along with the copy of the Bill of sale under Ordinance 22 of 1870, Section 18, the registration and Bill

BILL OF SALE—continued.

of sale are void against an execution creditor. The object of the Ordinance 22 of 1870, section 18 *et seq.* is the same as the English Bills of Sale Act. **CARRIER v. LEE PEE CHUAN & ORS** 417

2. —Defect in— 510

see AFFIDAVIT. 1.

BINDING CONTRACT—Agent—purchaser 542

see AUCTIONEER. 1.

BOUNDARIES—The cancellation of a deed, does not, in law, divest the estate out of the person in whom it was vested by the deed. Where land is first described in a deed by name, or by distinct ascertained boundaries, any additional description inconsistent with the first, has no effect. Thus, if lands are conveyed by definite boundaries, but are subsequently by the same deed said to contain a certain area, but it is afterwards discovered that such area is either more or less than that which is actually contained within the boundaries given, such additional description of the area in the deed is immaterial, and will be rejected.—*Query.* Will equity relieve in such a case between the parties, by awarding compensation? Where land is conveyed by distinct boundaries, the representation of either of the parties to the other, that the land contains a certain area, is immaterial, unless it is proved that such representations were made fraudulently, and knowing them to be false. **IBBETSON v. BROWN** 119

2. —And Abutments in Deeds—parol evidence 324

see LAND. 7.

3. —Government Permits—grantee in fee 514

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BREACH OF AGREEMENT—The defendant agreed with the plaintiff, that in consideration of Rs. 1,000 lent by plaintiff to defendant, that he would repay the same "within eleven days from the safe arrival of his vessel *Castle Eden*," at Singapore. The vessel, through his own default, never went to Singapore.—*Held*, in an action for breach of his agreement, that there was an implied undertaking on his part that his vessel, the said *Castle Eden* would go to Singapore, and inasmuch as she, through his default, did not, he was liable for his breach of such implied undertaking. A person who voluntarily signs a document as surety, cannot set up as a defence, that no money at all passed to him, but simply to his principal, which was well known to the plaintiff.—*Semle*. This rule applies

BREACH OF AGREEMENT—continued.

even to a joint and several promissory note made by a principal and surety. **MAYANDEE CHETTY v. SULTAN MERACAYAR** . . . 350

—**CONTRACT—Non-payment of price of goods** 453

see GOODS. 5.

2. —In cases of breach of contract by the non-delivery of goods, knowledge—on the part of the party committing the breach, is only of importance [in a question of measure of damages] if acted upon and forming part of the contract. Knowledge must be brought home to such party, under such circumstances, that he must have known that the person he contracts with, reasonably believed that he [the defaulting party] accepted the contract, with the special condition attached to it. Where therefore the plaintiff entered into a contract with the defendants, for the sale of certain quantities of Cutch leaf, and thereafter, but before any breach, knew that the defendants were purchasing it in order to send on same to Europe for sale, to certain persons there, with whom they had such contract, and the plaintiff subsequently committed a breach of his contract, by which the defendants were unable to fulfil theirs, and had to pay damages to their sub-contractors in consequence.—*Held*, that the damages so paid by the defendants to their sub-contractors, were too remote, and could not be recovered [on counter-claim] from the plaintiff, as damages for his breach of contract. **YEO LENG TOW & Co. v. RAUTENBERG, SCHMIDT & Co** . . . 491

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2. —The maxim *caveat emptor* admits of no exception by implied warrant in cases of sale of specific goods which are in existence, and which the purchaser had inspection of, before concluding his purchase. The case of *Randall v. Newson*, 2 L. R. Q. B. Div. 102 has not altered the law in this respect; and applies only to cases where a purchaser not only buys the article for a particular purpose and communicates that purpose and object to the vendor, but relies on the skill and judgment of the seller to supply what is wanted without exercising his own judgment thereupon. *Randall v. Newson*, [supra] and *Brown v. Edgington*, 2 M. & G. 279, observed on.—*Semble*. It is not yet decided law, that there is no difference between an ordinary vendor and a manufacturer, touching sales of goods on implied warrant. *MARKWALD & Co. v. MCALISTER & Co.* 667

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CHARITY—A direction by a testator, that the rents and profits of his land should be expended on certain ceremonies called "Sin Chew," is void as being in perpetuity, and not a charity. The Statutes I, Ed. VI., c. 14, 23 Hen. VIII., c. 10, and 9 Geo. II., c. 36, held not to be law in the Straits Settlements. *CHOA CHOON NEOH v. SPOTTISWOODE* 216

2. —Wakoff land for burial,—not 324

see LAND. 7.

3. —The Attorney-General is a necessary party to a suit relating to a charity, although there may be trustees of the charity, capable of enforcing or protecting its rights. *KADER MYDIN & ORS. v. HADJEE ABDUL KADER* 489

4. —Lands of a charity—the Mahomedan church—were vested in the Crown; the defendants wrongfully entered a portion thereof and commenced building there; the Imam, Khatib and elders of the congregation of the church—who were in possession of the church and lands, sued the defendant and obtained an injunction restraining them from continuing the building. —*Held*, on demurrer, that the plaintiffs could

CHARITY—continued.

not maintain the suit. The Court on allowing the demurrer, continued the injunction on certain terms which were complied with by the plaintiffs. The defendants did not then object to this; but three months after, moved to have the injunction dissolved, as the allowance of the demurrer had in law, put an end to the plaintiffs' suit, and the injunction, which went with it.—*Held*, they were too late, and their application now was practically an appeal against that decision, which could not be allowed. The Court will, on an *ex-parte* application, give leave to amend all proceedings, by making the Attorney-General plaintiff, and adapting the pleadings to such new state of things. *HAJEE ABDULLAH & ORS. v. KHOO TEAN TEK & ANOR.* . . . 500

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CHARTER OF SHIP—in full of all charges—construction of contract . . . 227

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CHARTER-PARTY—Where a vessel is chartered from one port to another, and the charter-party provides that the vessel should, at the port of destination, be consigned to certain agents, whose commission for inward and outward cargo is also arranged at certain rates, it is not incumbent on the master to take a return cargo from such port of destination; but if he decides to do so, he must take his return cargo through the agents named, and no other. Therefore where the master under such a charter is undecided whether he would or would not take in such return cargo, but at the same time held out reasonable expectation to such agents that he would, and the agents in faith of such acts, "circulated" the vessel, and obtained an offer to ship cargo in her, but the master subsequently changed his mind, and left

CHARTER-PARTY—continued.

the port without any return cargo, whereby the efforts of the agents were rendered abortive.—*Held*, the agents were not entitled to commission at the rate named in the charter-party.—*Query*. Could the agents have sued on a *quantum meruit*? *FRUCHARD v. SCHMIDT & ORS.* . . . 360

2. —Claim for hire or freight—limitation . . . 472

see ATTORNEY.

CHATTEL—Although it is a rule that there can be no passing of property in a chattel, except by delivery or deed, yet this has no application to contracts made in respect to chattels, for valuable consideration: and therefore there may be a mortgage of a chattel without deed. In the absence of a stipulation to the contrary, a mortgagee is entitled to immediate possession of the property mortgaged, until his debt is paid: and if he sell the property, whether he then had the right to do so or not, such sale does not re-vest the right of possession to such property, in the mortgagor, so as to enable him to sue in trover, as long as the debt remains unpaid. *MAXWELL v. CHETTYAPAH CHETTY* . . . 201

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CLAIM—Hire or freight—Charter-party—limitation . . . 472

see ATTORNEY.

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COMMISSION—Charter-party . . . 360

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COMPENSATION—Premises taken for public purposes—arbitration . . . 544

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COMPOSITION DEED—Debtor . 67

see CREDITOR. 1.

COMPOSITION—An insolvent who pays a creditor a sum over and above a certain composition which he has arranged to pay his general body of creditors, in consideration of such creditor consenting to appear as an assenting creditor to such composition, is entitled to recover from such creditor the sum so overpaid by him, as money had and received; and that, whether the sum has been paid by him in money, or by means of a bill accepted by him. The fact that a bill was accepted by a third party, in consideration of the creditor so consenting to appear as an assenting creditor to the composition, which bill, such third party afterwards voluntarily pays—does not prevent the insolvent recovering from the creditor the money so paid by such third party, in the same way as if he, the insolvent, had personally paid it. **TAN KOK SENG v. LETCHMAN CHETTY** . . . 162

2. —Plaintiff having arranged on a composition with his creditors, of whom the defendant was one, to pay them 50 per cent. of their claims, by means of three bills payable at three, six and nine months respectively, handed the defendant three bills, which, by mistake, were made out, together for 75 per cent. of his claim: the first two bills were duly paid at maturity, which together made up just 50 per cent. of the defendant's original claim. Before the third bill fell due, the defendant failed in business, and had himself to enter into an arrangement with his creditors, by which certain Inspectors were appointed to collect his assets, and among others the amount payable on the third bill, and to divide them among his several creditors. On the third bill falling due, the plaintiff paid the defendant's Inspectors \$500 to account of it, and this money was, by the Inspectors, distributed among defendant's creditors. After this, the plaintiff discovered the mistake he had made, and not only refused to pay the Inspectors the balance payable on the third bill, but claimed from the defendant, a refund of the \$500, which he [plaintiff] had paid under such mistake. The defendant refused to refund the money, alleging that he was not liable to do so, as the money had been paid by the plaintiff to his [defendant's] Inspectors, and by them had been distributed among his creditors; and he personally had derived no benefit by the payment.—*Held*, that the defendant was bound to refund plaintiff the \$500, and that the plaintiff was entitled to recover it as money paid at the defendant's request, or as money had and received by the defendant for the use of the plaintiff. **LIM MAH PENG v. BROWN** . . . 170

CONCEALMENT OF FACTS.—Agent and Principal . . . 619

see KNOWLEDGE 3.

CONDITION PRECEDENT—Defendants contracted to sell plaintiff a certain number of Pillar or Carolus dollars, and the contract was reduced to writing, and was as follows:—"Sold to Lim Sim Kay 12,000 "Carolus, 110 per cent. if sent by bank, at "the earliest steamer's arrival. Chopped "dollars not to be included. Signed p. p. "Fraser & Co., A. M. Watson." The defendants then, with plaintiff's knowledge and consent, despatched a telegram to the bank in question as follows: "Carolus dollars "agreed 10 per cent. 12,000, if without "chops, ship "per first steamer." The bank replied same day by telegraph, cannot "now "sell Carolus under twelve. No picking or "refusing allowed. Price here twelve, firm. Reply."—*Held*, the sending by the bank of the dollars was a condition precedent to the defendants' liability to the plaintiff: that the reply of the bank refusing to allow "picking or refusing" was a refusal to send the dollars asked for: and the condition precedent had not been fulfilled.—*Held also*, that the sending thereafter by the bank to the defendants of same amount of Carolus dollars, partly chopped and partly unchopped for a third party, was also not a fulfilment of the condition precedent. **LIM SIM KAY v. FRASER & Co.** . . . 380

2. —Re-payment of money . 467

see AGREEMENT. 6.

CONJUGAL RIGHTS—The Supreme Court has no jurisdiction either on its Civil or Ecclesiastical side, to entertain a suit for restitution of conjugal rights among non-christians. The 23rd Section of the Court's Ordinance V. of 1868, only gives the jurisdiction the old Court of Judicature had under the Charter of 1855, which was the jurisdiction of the Ecclesiastical Court at home, and which was confined to Christian marriages. **LIM CHYE PEOW v. WEE BOON TEK** . . . 236

2. —The Court has no jurisdiction, on its civil side, to entertain a suit for restitution of conjugal rights by Mahomedans. **SHAIK MADAR v. JAHARRAH** . . . 385

CONSTRUCTION OF STATUTE—It is a rule of construction, of a Statute or Ordinance, that the provisions therein, cannot refer to powers and authorities not in *esse*, at time of its coming into operation. Therefore, although by the Courts Ordinance 5 of 1873, the Sheriff is empowered and required to execute *all* warrants and process of the Court, yet, as he was neither empowered nor required thereby to execute distress warrants, he could not be required

CONSTRUCTION OF STATUTE—*contd.*

to execute such warrants, issued under the Distress Ordinance 14 of 1876, in which latter Ordinance, he is not specially named as an officer. The Sheriff is not a "bailiff or other officer," within the meaning of the Distress Ordinance.—*In re SHERIFF OF PENANG* 426

CONSTRUCTIVE NOTICE—Agent—Principal 619

see KNOWLEDGE. 3.

CONTEMPT OF COURT—Where a Solicitor in his pleadings stated, that the plaintiff [his client] submitted himself to the Civil Jurisdiction of this Honorable Court, —*Held*, that he had been guilty of gross insult to the Court, and he was summarily struck off the roll of Law Agents. *ISHMAHEL LAXAMANA v. EAST INDIA COMPANY—In re TREBECK.* 4

2.—The powers of Commissioners of the Court of Requests are strictly limited by section 20 of Act XXIX. of 1866; and as regards contempts, they possess no further powers of dealing therewith, than those expressly given by that section. The Commissioners have no power to deal with a contempt out of Court. A single Commissioner has no power to fine for contempt, and none to imprison for non-payment of the fine.—*Query*. Is the Court of Requests a Court of Record? In England, the Judge of an inferior Court, is liable to an action, if he acts beyond his jurisdiction, and then knew, or had the means of knowing the defect, and this although he acted *bona fide*. In this Colony, however, since the Act XVIII. of 1850, he is not so liable, if he, at the time, in good faith believed himself to have jurisdiction, but in all such cases, he must have acted really and *bona fide* in his judicial capacity, and not merely colourably so.—*Query*. Does Act XVIII. of 1850 apply to cases where the excess of jurisdiction is due to the Judge's misconception of the law, or only to ignorance of facts affecting his jurisdiction? The Act, however, can only afford protection where the Judge acts in good faith; but "good faith" must be founded on reasonable grounds, or otherwise the Judge's immunity from legal liability for acts done out of his jurisdiction, would be in direct proportion to his ignorance and thoughtlessness.—*Query*. Is a Judge of an inferior Court liable, if he act within his jurisdiction, but does so maliciously and without any reasonable or probable cause?—*Seemable*. The test in such a case, probably is, whether he acted really or only colourably judicially.—The plaintiff, a solicitor, served the defendant, a Commissioner of the

CONTEMPT OF COURT—*continued.*

Court of Requests, at his private residence, with an ordinary notice of appeal on behalf of a suitor in the Court of Requests, and also served a similar notice on the clerk of the Court. A day or two after, the plaintiff received a letter from the clerk, written by instructions of the defendant, requesting the plaintiff kindly to call at his [defendant's] office, as, he [defendant] wished to speak to him. The plaintiff accordingly went to the defendant's office, but found him out. In passing the Court, he saw the defendant on the Bench trying a case; he sent in his card, whereupon the defendant beckoned him into Court. The plaintiff walked up to the Bench, and stood between it and the table of the clerk, and the business before the Court was suspended for the time. The defendant then had some conversation with the plaintiff, during which the defendant informed the plaintiff that the notice was a very improper one, and was very improperly served, and after further conversation on the subject, [which the defendant considered to be carried on in a disrespectful and contemptuous manner on the part of the plaintiff,] the plaintiff informed the defendant that he came to see him simply as a private individual in consequence of his request, and not in his judicial capacity, and was not a party in any proceeding before his Court, and wishing him "good morning," was about walking away, when the defendant called him to stop; the plaintiff continued walking, and the defendant thereupon called out, "You are fined \$25 for "contempt of Court," to which the plaintiff replied, "I wish you may get it," and walked out. The following day, the defendant issued his warrant for the apprehension of the plaintiff if he omitted to pay the fine, the plaintiff still refusing to pay the fine, he was lodged in prison for some days under the warrant, whereupon he brought an action against defendant for false imprisonment, to which the defendant replied he did the act in his judicial capacity.—*Query*. Whether under the circumstances, the defendant could be considered as really acting judicially or only colourably so?—*Held*, however, whether the defendant acted judicially or not, as a single Commissioner of the Court of Requests, he had no power to fine or imprison for contempt: that having acted beyond his jurisdiction, without any reasonable grounds for believing he had jurisdiction, he was liable in damages to the plaintiff for the false imprisonment. *DAVIDSON v. ORD* . . . 205

CONTRACT—Plaintiff and defendants entered into a contract in writing, by which

CONTRACT—continued.

plaintiff "engaged to deliver to the defendants, all sugar manufactured on his estate from 1st October, 1857, to 30th June, 1858, both inclusive."—*Held*, that what was meant by the contract was, not that the deliveries should be made between the dates in question, but only that the sugar should be manufactured between those dates—and that the defendants were bound to accept all sugar manufactured on or before the latter date, and which was tendered to them within a reasonable time thereafter. The sugar was tendered by plaintiff on the 12th July, 1858,—*Held*, this was within a reasonable time. The sugar tendered, however, on that date [12th July] was in boxes, undergoing the process by which molasses are finally separated from the granulated sugar; and though the upper portion in each box was what in commerce would be considered "sugar," still the whole mass taken together would not be so considered—though planters would call it sugar.—*Held*, that the article tendered was not "sugar" manufactured by the 30th June, and the defendants were not, therefore, bound to accept same, nor even that portion of it as had granulated, but which could not be separated from the rest.—*Query*. Whether if the separation could have been effected, the defendants were bound to have done so, and to accept the granulated portion? *CHASSERIAU v. MATHIEU & Co.*, . . . 117

2. —Where a builder contracts to erect a building in a certain manner, but neglects to do so, he is not entitled to recover the price of such work on the contract, nor yet on a *quantum meruit*, even though the owner take possession and has the use of the work so done, as no implied promise arises from the fact that the owner has so taken possession, as he but makes use of his own land and all that is affixed thereto.—*Munro v. Butt*, 8 E. & B. 733, followed. *RUNGASAMY v. ISAAC AARON PIL-LAY* 168

3. —Bailment—negligence—trover—conversion 230
see *PRIVITY OF CONTRACT*. 2.

4. —Flea of infancy—ignorance 321
see *INFANCY*.

5. —Tender—stamp 394
see *AGREEMENT*. 4.

6. —Breach of,—non-payment of price of goods 453
see *GOODS*. 5.

7. —The defendants, wharfingers and warehousemen at Singapore, were employed by the plaintiffs to moor all plaintiffs' vessels coming into port, alongside their wharf, and to receive from such vessels all

CONTRACT—continued.

goods intended to be landed at Singapore and to warehouse them. In order to enable the defendants to know what goods were to be thus received by them, the plaintiffs' agents at Singapore furnished them, on or about the expected arrival of such vessel, with the manifest; this manifest the defendants copied into a book kept by them for the purpose, and then returned it. On receipt of the goods by the defendants, they entered them in a separate book, and within a fortnight thereafter sent in to the plaintiffs' said agents, a return of all goods so landed and warehoused; this return had columns also shewing all goods damaged, short landed and overlanded. In the course of the defendants' employment, they having first been furnished with a manifest as usual, received certain goods from a vessel of the plaintiffs, called the *Glenlyon*, and in so receiving these goods, they received certain goods which were not intended for Singapore, but for another port, and which were not on the manifest: these goods they entered, along with the other goods received, into their books as usual, but in their return to the plaintiffs' said agents, they omitted all mention of these overlanded goods; these overlanded goods should, according to their practice and the form of the returns, have been placed in the overlanded goods column thereof. The consignees of these goods at such other port not having received their goods, called on the plaintiffs for compensation for their loss—the plaintiffs' said agents then enquired of the defendants if such goods were with them, but were, through forgetfulness of the fact, told that they were not. Some six months after, on a return being sent in by defendants to plaintiffs' agents, of all goods in their possession, for which rent was due, the overlanded missing goods appeared. The plaintiffs thereupon sued the defendants for damages for negligence in overlanded the goods, and for not informing plaintiffs or their agents thereof, within a reasonable time.—*Held*, that there was an implied contract by the defendants, and a duty cast upon them, to report to the plaintiffs or their said agents, within a reasonable time, as to overlanded goods in their possession; and that, under the circumstances, they were guilty of negligence in that respect, and were liable to the plaintiffs in damages therefor.—Where a plaintiff has been guilty of negligence, which has, in fact, contributed to the loss complained of, yet, if the defendant could in the result, by exercise of ordinary care and diligence, have avoided the mischief, the plaintiffs' negligence will not excuse him

CONTRACT—continued.

[defendant]—*Radley v. London and North Western Ry. Co.*, 1 L. R. App. Cases, 754, followed. *MCGREGOR & ANOR. v. TANJONG PAGAR DOCK CO., LD.* . . . 461

8. —Breach of,—for non-delivery of goods—knowledge . . . 491

see BREACH OF CONTRACT. 2.

9. Covenant—Award . . . 497

see AWARD. 3.

10. —The plaintiffs having contracted with one A. to purchase certain lands, from him, thereafter agreed with the defendant to sell the same to him, at a large profit. Lands in that neighbourhood were then rising every day in value, by reason of certain Government Notifications, and were required for immediate purposes of building, to supply the wants occasioned by the said Notifications. A. hearing the plaintiffs had sold the land at so large a profit, refused of his own wrong, to complete the contract he had made with them, and in consequence was sued by the plaintiffs for specific performance of his contract. While this action was pending, the plaintiffs and defendant executed an agreement, which, after reciting that the plaintiffs had purchased the lands of A. and had agreed to sell it to the defendant, the said A. refused to carry out his contract, proceeded as follows:—"We have instituted an action against him in the Court, after demanding from him the said lands. If we succeed in getting judgment in the case, and the lands decided in our favour, we shall immediately make the Bill of sale in your [defendant's] favour, or in favour of those whom you will appoint. If we do not succeed in getting the lands in the suit, we will return to you the said sum of \$200, which we took from you as an advance." The plaintiffs' case against the said A. was a long while, [owing to the block of cases on the trial list.] pending, before it was heard—it eventually came off, and A. was decreed specifically to perform his contract with the plaintiffs. The defendant hearing the plaintiffs had succeeded, called on them to fulfil their contract with him, but owing to the said A. having appealed against the decree, they were unable to do so. The defendant then repudiated all further connection with the land, and claimed that his contract was at an end, and requested a re-payment of his advance. The plaintiffs refused to admit this, and so matters remained, until the appeal, which took some nine months before it was heard, and the judgment against A. in the Court below, affirmed. A. thereafter specifically performed his contract with the plaintiffs, and the plaintiffs called on the

CONTRACT—continued.

defendant to complete his contract with them. At that time the value of the land had considerably gone down, and was no longer of much use to the defendant, as sufficient lands had been utilized for the purposes of the Government Notifications. The object for which the defendant had purchased it had wholly failed. The plaintiffs then sued the defendant for specific performance of his contract.—*Held*, by the Court below, that the defendant was justified in his refusal to take the lands, as "judgment in the case" meant, judgment of the Court below, in which the suit was pending at the time of the agreement: that plaintiffs being unable then, by reason of A's appeal, to perform their contract, the defendant was discharged from his.—*Held*, on appeal [by Ford and Wood J. J., *Sidgreaves, C. J. diss.*] reversing the judgment of the Court below, that "judgment in the case" meant final judgment, whenever, and at whatever Court it might be—and the defendant having so contracted was bound to take the land. Decree for specific performance by him accordingly.

MAHOMED MUSTAN & ANOR. v. KANA SHAIK IBRAHIM . . . 582

CONTRACT IN WRITING—Memorandum—Conditions of sale . . . 654

see AUCTIONEER. 2.

CONTRACT OF SALE.—Vendor and Purchaser . . . 184

see GOODS. 3.

2.—Charter-party . . . 227

see WHARFAGE.

CONTRACTS.—The Lord's Day Act, 29, Car. II. c. 7, as far as contracts are concerned, applies to both Christians and non-Christians in this Colony. Borrowing money and giving a note for it, even by a tradesman, is not a thing done in the course of his ordinary calling; but it would be otherwise, if given for goods sold according to the ordinary calling of the vendor.—To a plea stating that a note was made on Sunday, the plaintiff replied, that after making the note, the defendant promised to pay.—*Held*, on demurrer, that it was bad.—*Seemle*. The penal portion of the Act does not apply.—*COOMARAPAH CHETTY v. KANG OON LOCK* . . . 314

2. —in respect to Chattels—valuable consideration . . . 201

see CHATTEL.

CONVEYANCE—A conveyance which was executed by one person to another, on the understanding that it should not operate as such, till the purchase money therein mentioned was paid.—*Held*, to be only an escrow, and inoperative to convey any

CONVEYANCE—continued.

interest, until the money was paid—although the conveyance was, on the face of it, an out and out one, and purported to acknowledge receipt of the purchase money.—**TEEMAH v. MAT TOH DIN** . . . 432

COSTS—Payment of judgment and,—no bar to appeal . . . 12

see **AGREEMENT**. 1.

2. —Demurrer—action for trespass and false imprisonment . . . 254

see **TRESPASS**. 2.

3. —Motion to set aside proceedings—irregularity . . . 274

see **SCIRE FACIAS**.

4. —The Court will not order the defendant [Execution-Creditor] in an Interpleader suit, although a bankrupt, to give security for costs.—*Query*. Will the Court order a plaintiff, who is resident within the jurisdiction of the Court, and is a bankrupt, to give security for costs, whether he sues on behalf of the trustees or otherwise; and if he sues on behalf of the trustees, will they be ordered to give security for costs.—**NAIRNE v. TUNKU MUDA HUSSAIN** 325

5. —**COSTS**—Court of Requests . 471

see **COURT OF REQUESTS**. 3.

6. —A plaintiff is entitled to his costs against all defendants in the suit, although the defendants may have severed in their defence, and one of them adopts a line of defence which occasions heavy costs, and with which the other is wholly uninterested.—**SHAGAPAH CHETTY v. CAPEL & ANOTHER** . . . 512

7. —General Estate—contribution 544
see **LIFE ESTATE**.

8. —Where a plaintiff brings two distinct actions of the same nature, against two defendants, which as regards his case is identical,—and for convenience sake the two actions are tried together, and both result in a verdict for him,—he is not entitled to have the costs of his witnesses, common to the two actions, wholly from one of the defendants, leaving him to his remedy against the other of them; but such costs will be apportioned between the defendants on some just principle of apportionment; and in default of finding any such principle, equally between the two. The solvency or insolvency of either of the parties, is no just principle to go by.—**ALLAH PEECHAY v. YEAP HUP KEAT** . . . 556

9. —Stay of proceedings . . . 601
see **ADMINISTRATION**. 1.

10. —Power of Court of Appeal to review or vary order as to— . . . 647

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11. —Sum recovered within jurisdiction of Court of Requests . . . 672
see **LIGHTERAGE**. 2.

12. —*see also* **ACCOUNTS**. 1. . . 586

COURT-MARTIAL—Military Jurisdiction . . . 1

see **MILITARY LAW**.

COURT OF REQUESTS—Powers of Commissioners of,—in regard to contempts 205
see **CONTEMPT OF COURT**. 2.

2. —*Semble*. If an action has been tried in the Court of Requests, and judgment given therein, such judgment is binding on the parties, and they cannot afterwards come into the Supreme Court about the same claim, even if plaintiff was merely non-suited in the lower Court.—**BEMBEN v. CURPEN KEECHEE** . . . 313

3. —Where a party recovers judgment in the Court of Requests with costs, and a large portion of his costs are disallowed on the ground that such costs are beyond the Court's jurisdiction and practice to allow, no action lies in the Supreme Court for such extra costs. The judgment of the Court of Requests is final; and except as is provided by section 12 of the Appeals Ordinance IX. of 1874, cannot be reviewed by, or sued on, in this Court.—*Query*. Whether the Court of Requests has power to allow a successful party costs incurred by him for witnesses' expenses, Solicitors or Counsels' fees, carriage hire and the like?—**RAMASAMY v. NARAINEN CHETTY** 471

4. —Sum within jurisdiction of,—recovered in Supreme Court . . . 472

see **ATTORNEY**.

5. —*see also* **COSTS**. 11. . . 672

COVENANT.—An advertisement in English, published in a local newspaper, is no notice to a Chinaman who is unable to read that language. So where the plaintiff, a Chinaman, after such advertisement, received rent for his premises, of persons who he still then believed to be those he had rented his premises to, and such receipt of rent was, after certain breaches of covenant,—*Hill*, that there was no waiver of the breaches, as there was no notice of the change; and the advertisement did not, under the circumstances, amount to notice. A covenant not to assign is a covenant that runs with the land, and the assignee of the reversion may take advantage of any breach of it. Where a Company takes a lease of certain premises and covenants not to assign, and subsequently, during the term, is amalgamated with another Company upon which the original Company is dissolved, and the newly formed Company,

COVENANT—continued.

by the same manager and clerks, occupy the premises.—*Held*, a breach of the covenant. B. by deed, leased certain premises to the B. I. E. Telegraph Company for a term of 21 years, which lease contained covenant by the Company not to assign without the consent of B. or his assigns. The B. I. E. Company, in conjunction with the C. S. Telegraph Company and B. A. Telegraph Company, amalgamated, and formed themselves into a new company, called the E. E. A. & C. Telegraph Company [defendants]. On the amalgamation, the three first companies were dissolved and wound up, but the premises were continued to be occupied by the same manager and clerks of the original Company; who had become the servants of the newly formed Company. B. assigned the reversion in the lease and premises to the plaintiff, who, as soon as he found the change of companies, sued the defendants, the newly formed Company, in ejectment.—*Held*, he was entitled to recover the premises as assignee of the reversion. The Statute 32 Hen. VIII., c. 34, extends to this Colony. *OH YEAN HENG v. EASTERN, & C., TELEGRAPH CO., LD.* 304

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CREDIT—Principal and agent—foreign principal 85

see **FOREIGN MERCHANT**.

CREDITOR—A creditor who had claims in three several capacities against his debtor, received in all three capacities dividends from the Trustees of his debtor, under a composition deed. He signed the composition deed once, without shewing, on the deed, in what character he signed it. He subsequently denied he had signed the deed and received any dividend, except in his individual capacity, and threatened his debtor that unless some security was given for one of the two claims which he had in a representative character, he would take proceedings against him. He concealed from the debtor the fact that he had received dividends in such representative capacity, and when the debtor was induced to make a mortgage bond to secure the one representative claim, he falsely represented that he had paid the estate he represented, and required the bond to be made in his own name, which was done.—*Held*, the receipt of the dividends in the three capacities, and signing his name generally, was a sufficient assent by him to the composition deed, so as to make it binding on him.—*Held* also, that the misrepresentation that he paid the estate he represented, the debtor's debt,

CREDITOR—continued.

and the fraudulent concealment in not disclosing that he had already received, in such representative capacity, a dividend under the composition deed, were sufficient to render the mortgage bond, fraudulent and void, and the same was ordered to be given up to be cancelled, at the suit of the debtor, who subsequently came to learn of the fraud practised on him.—*MCINTYRE v. GALASTAUN* 67

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see **CREDITOR**. 1.

DEBTOR'S GOODS—A plaintiff by attaching his debtor's goods under section 422 of the Civil Procedure Ordinance 1873, acquires no title to the goods; and if it is necessary for an equitable mortgagee of the goods to perfect his title by notice, he may do so even after the plaintiff has attached the goods, and before he seizes them in execution. An equitable mortgage of personality, does not however require to be perfected by notice.—*GUTHRIE & Co. v. SHEENA MOHAMMED ABDUL KADER—In re: ARNASHELLUM CHETTY* 553

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DEED—Cancellation of,—estate vested—land 119

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2. —A stranger to a deed, cannot under the deed, seize and sell any thing mortgaged by the deed; if he do so, he is a trespasser, even though the monies due on the deed be due to the firm in which the defendant was a partner, and though he sold the vessel and applied the proceeds to account of such debt. But under the above circumstances, the Court will only give nominal damages, as the plaintiff derived a benefit by the defendant appropriating the proceeds to account of the debt due on the deed.—*Query.* Whether, if the defendant was a party to the deed, and the deed contained no power of sale, he could avail himself of the deed, without pleading it specially either on equitable grounds or otherwise?—**TUNKU MUDA CHOOT LATIFF v. LIM SEANG** 234

3. —A stranger to a deed cannot maintain an action on it, though he be a partner of the persons with whom the deed was entered, and the deed was intended to have been entered with the firm in which they were partners. The legal representatives of such persons, are the proper persons to bring the action.—**LIM CHEONG & ORS. v. TUNKU MUDA CHOOT LATIFF & ORS.** - 235
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2. —Amendment of Statement of,—plea of Statute of Limitations . . . 513
see **AMENDMENT.**

DEFENDANT—A defendant being sued at law for money lent, &c., on the common money counts, pleaded that he had before the commencement of the action, sued the plaintiff, in equity, for an account, which included the monies sued on in the action, and such suit was still pending, and in support of his plea, produced the records of the two cases, from which it appeared, that though, some of the items were the same, yet the equity suit was based on a fiduciary relationship alleged to exist between the plaintiff and defendant, and claimed peculiar relief, relating to several matters.—*Held*, that the two suits were not for the same cause of action, and the plea was overruled. **NARAINAN CHETTY v. ABDUL RAHMAN, alias KAFERKE** 431

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DEPOSIT OF DEEDS—A mere deposit of title deeds without any writing referring to them, does not create any equitable mortgage, but only a pledge. Even if a mere deposit of title deeds as aforesaid does create an equitable mortgage, still the person holding them, is entitled to maintain an action to recover the moneys, [for which the title deeds were deposited as a security,]—on the common money counts, although at the time he retains the title deeds as security.—**HUSSAIN SAIBOO v. GOLAM MYDIN ET UXOR** 347

DEVIATION—Sea-worthiness—Law of country to prevail 174
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DEVISE—A testator devised certain lands to charitable purposes which he directed to be under the management of his sons, no body else being allowed to interfere therewith—and towards the conclusion of his Will, stated as follows:—"My son Oodman "Nina, will act as my executor, and on his "death, my second son Oodman Sah—in the "absence of my sons, their sons will succeed "as executors.....they will succeed one "to the other, the eldest son first, and the "next afterwards, and so forth."—*Held*, that the eldest grandson in point of age,—and without reference to his being the son of the first or second son,—was entitled to succeed as executor—and that the testator, judging from his language, intended, such his executors, to be also the trustees of the charity; and that consequently on the death of the two sons, the eldest grandson, as aforesaid, was the trustee of the charity. *In the goods of* Cauder Mohuddeen, deceased, Straits Law Reports, p. 231, observed on. **ATTORNEY-GENERAL v. HAJEE ABDUL CADER** - 616

2. —Where there is a devise of property, coupled with a restraint against alienation, the restraint alone is void, and not the whole devise. A testator who died prior to 1837, devised a house and monies to his daughters as follows: "I give "and hand over to my daughters, the house "&c., to live in together, it shall never be "either mortgaged or sold, . . . I give "and hand over also to each of my daughters "a sum of \$30. I trust the furniture in the "said house, to my youngest daughter, until "they all are married, when it shall be equally divided among them. My sons or other "relations will not interfere in this arrangement." By a subsequent part of the Will, he provided for his sons, and gave the residue of his estate, real and personal, to them.—*Held*, that although the question was raised subsequent to the Wills Act XXV of 1838, the rules of construction prior there-

DEVISE—continued.

to must be the rules governing the construction of the testator's Will, and that the daughters therefore only took a joint estate for life, in the house. **KHOO SROK HAING v. KHOO WEE TEAM & ANOR** . . . 633

DISTRESS WARRANTS—see CONSTRUCTION OF STATUTE . . . 426

DISTRIBUTION OF PROPERTY—A. an aged Chinese woman, in 1825, made a document in China, in her own language, by which she declared that for the peace of her family, she made a distribution of her property between her four sons, and therein referred to her interests in certain property in Penang, which she reserved for "her daily expense." The sons were no parties to the document, but respectively acquiesced in the same. The title deeds of this Penang property were in the name of one of these sons, and appeared to be his absolutely. From the date of the aforesaid document, and for a period of about fifty years thereafter, the rents of this Penang property were remitted to China, and distributed by the then eldest member of the family, among the said four sons or their descendants. In 1864, certain descendants of these four sons made a further document, by which, after referring to the previous document made by their "ancestor," and with the view of offering an inducement to the members of the family to study, the rents of these Penang houses were divided into certain proportions. The plaintiff was a party to this latter document, but the defendant was not. In 1880, the defendant, the administrator of the son in whose name the title deeds to this Penang property were, claimed the property as his exclusively, and refused to recognize the aforesaid dealings and disposal of the same, whereupon the plaintiff, an adopted son of one of the four sons, and interested by name in the original document of 1825, brought this suit to have the aforesaid Penang property declared to be A's, and the document of 1825, a good and valid family arrangement, and binding on defendant.—*Held*, that the document was a valid family arrangement, and binding on the defendant.—*Held* also, that although the document of 1864 was not made by the defendant, or otherwise binding on him, it was properly admitted in evidence, as shewing the state of things in the family at that time, in connection with this property. **KHOO JOO HEEM v. KHOO JOO LAM** . . . 596

DIVORCE—A Chinese female in this Colony, is at liberty to marry, after being divorced from her former husband—and such marriage will be held valid, notwithstanding that, at such second marriage, no

DIVORCE—continued.

guardian [or Wallee] for marriage, is present. The law of China, to the contrary, is not applicable to this Colony. **NOLIA CHEAH YEW v. OTHMANSAW MEXICAN & ANOR.** . . . 160

2. —Mahomedan.—Concubines competent witnesses by English law . . . 255
see ENGLISH LAW. 3.

3. —No action can be maintained in the Supreme Court against a Kali or Mahomedan priest, for divorcing a person from his wife contrary to Mahomedan Law, as it is a matter wholly beyond the powers and jurisdiction of the Court.—**ADDOOMEN KAKAH v. LEBBY DAIN** . . . 433

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DOMESTIC SERVANT—Menial servant—wages—limitation . . . 479
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EJECTMENT—Judgment in an action of trespass, where the title to the freehold, has been put in issue, and decided on, is an estoppel to a subsequent action of ejectment for the same land, provided there has been a trial and verdict in such first action; but where the judgment in such action of trespass is only by consent, this operates no more than a judgment by default, and is no estoppel. The Statute 8. & 9 Vict., c. 106, does not apply to this Colony. Twelve years uninterrupted possession is, by the Limitation Act XIV. of 1859, sufficient to maintain an ejectment. The above-named Limitation Act is retrospective. **MAHOMED JOONOS v. SAIBOO . . . 242**

2. —Title-Deeds—Claim to land 601
see ADMINISTRATION. 1.

3. —The defendants had obtained permission of one Sheriffa Zoharra, to build houses on certain lands belonging to her deceased father, of whose estate she afterwards became administratrix. The defendants, in pursuance of such permission, erected their houses on such land, and continued to reside there for a great many years beyond the statutory limit prescribed by the Limitation Act XIV. of 1859, without paying rent for such holdings. When applied to by the executor of one Syed Abdulrahman, who, in his lifetime was the executor of the father of the said Sheriffa Zoharra—after the statutory period aforesaid

EJECTMENT—continued.

—they refused to pay rent to him; they did not then however claim the land as their own, but set up their holding under the said Sheriffa Zoharra. Sheriffa Zoharra subsequently got administration to her said deceased father's estate, and sometime thereafter, herself applied to the Ecclesiastical Court that the Letters to her might be revoked, and granted to the plaintiff: the plaintiff thus became the administrator of the estate, of the said deceased father. The said Sheriffa Zoharra, as such administratrix, [before the revocation of her letters] demanded, as such, rent of the defendants; they refused to pay her, and then, disclaimed holding under her. The plaintiff, on being appointed administrator as aforesaid, and within the statutory limit after such disclaimer, thereupon brought this ejectment against the defendants, to recover possession of the respective portions on which their houses stood. It was objected by the defendants, at the trial, that as they had been over 12 years in possession adversely to the executor of the executor of the said deceased father, and now this action being brought by the plaintiff, as the administrator of such deceased,—the plaintiff was barred by the Act of Limitation XIV. of 1859, sec. I. cl. 12: it was admitted that if Sheriffa Zoharra had sued, the defendants would have been estopped from disputing her title, but, as she had not transferred her right to the plaintiff, nor sued herself, the plaintiff could not avail himself thereof.—*Held*, that as, if the said Sheriffa Zoharra had sued, she would, equally with the plaintiff, have been a trustee for the next-of-kin of the deceased—and the Ordinance IV. of 1878, obliges the Court to deal with real and not technical rights—the objection could not be allowed, and the plaintiff was entitled to recover. On appeal, this judgment was affirmed. The fact that Sheriffa Zoharra had not legally transferred her right to the plaintiff, or that the plaintiff was suing in his own name, was immaterial. If there was anything in the objection, the Court would, under sections 105, 123 and 126 of Ordinance V. of 1878, have allowed the plaintiff to amend the title of his suit by substituting the said Sheriffa Zoharra as nominal plaintiff, and that without terms.—*Semble*. The Court of Appeal has power to allow or direct an amendment in the title of a suit.—*KYSHE v. INCHE NAP PENDEK & ORS.* 624

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ENGLISH LAW—Extended to the Colony by Charter of 1807 1

see MILITARY LAW.

2. —Inheritance—Charter of 1807 . 27
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3. —The law of England was introduced into this Settlement immediately on possession thereof being taken in the name of the King of England by and for the use of the late East India Company: all laws [if any] previously existing, thereupon immediately ceased. The circumstance that possession was taken by an Officer of the East India Company, does not prevent the transfer of the sovereignty and dominion of the Island to the Crown of England, especially as the rights of the Crown over all the territories of the Company are preserved by the Act 53 Geo. III., cap. 155, sec. 93. The fact, that when possession was taken of this Settlement there were a few wandering fishermen on the Island, does not affect the general rule of law in such cases, inasmuch as they could not be regarded as the inhabitants of a settled country with laws of their own, and who are entitled to the benefit of them, until changed by competent authority. The law of England was certainly imported into this Settlement by the Charter of 1807, if not earlier. The competency of witnesses, is to be determined by the law of the forum; so that though, by Mahomedan law, concubines are incompetent witnesses to prove a divorce, still that is no reason why their evidence should not be received in a Court of Justice in this Settlement, where, by English law, they are competent. A testator directed that any legatees or devisees "proceeding to law in any Court or Courts for their said shares" should lose their legacies.—*Held*, the direction was void, as property is inseparable from the right to institute legal proceedings and the protection of the law, and it was repugnant and inconsistent with the gifts. The testator gave certain personal property [naming them] to certain legatees. In an afterpart of his Will, he gave the whole of his personal property to his executors upon certain trusts, without excepting the property so first bequeathed away.—*Held*, the latter portion did not override the former as being irreconcilable with it, or on the principle that it denoted a later intention; that rule only applies on failure of every attempt to give the whole such a construction as will render every part of the Will effective. He further directed that the rents and profits of his estates, after deducting expenses of collection and management, should be divided into twenty-four shares, and to be held upon trust for the benefit of his children

ENGLISH LAW—continued.

and grand-children, whom he named, and their issues. These shares he then proceeded to distribute among his children and grand-children in certain proportions, and finally directed as follows: "I direct that the annual income of the said share or shares so set apart for my sons and grand-sons and their respective issues in the said trust estate and premises, shall be paid to the same son or grandson during his life, and from and after his decease, that his said share or shares shall be held in trust for all such sons born in my lifetime, at such ages and times as I might by any writing under my hand or by my Will appoint, and in default of such appointment, &c., in trust for all my children, who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, in equal shares, and if there shall be but one such child, the whole to be in trust for such child.—*Held*, that the direction was not void on the ground of remoteness. He further devised eleven pieces of land in Penang, which he particularly described, to trustees, and directed the same be called the "Whakoff of Mahomed Noordin." He further directed his trustees out of the rents and profits of such lands, to pay for ever the sum of \$20 monthly to the managing body of a certain School; the sum of \$60 monthly to his daughter, Tengah Chee Mah, and her lawful issue during their natural lives; and also the sum of \$40 monthly for the maintenance of one of his sons and his wife. He then gave the residue of such rents and profits upon trusts as follows: "To expend for the yearly performance of kandoories and entertainments for me and in my name to commence on the anniversary of my decease, according to the Mahomedan religion or custom, such kandoories and entertainments to continue for ten successive days every year, and also in the performance of an annual kandoorie in the name of all the prophets, and to expend the same in giving a kandoorie or feast according to the Mahomedan religion or custom, to the poor for ten successive days in every year from the anniversary of my decease, to the extent of three hundred dollars, including the costs of lighting up the mosque or burial-place of my deceased mother and the school-rooms thereto adjoining; and also to give kandoories or feasts to the poor aforesaid once in every three months to the extent of one hundred dollars; and provided there should remain any surplus monies, then the same is to be expended in purchasing clothes for distribution to the poor."—*Held*,

ENGLISH LAW—continued.

[firstly] that the trust for the school was a good charitable bequest and therefore valid.—*Held*, [secondly] that the gift to Tengah Chee Mah and her issue, was a gift to her for life; for her sole and separate use, with remainder to such of her children as were in existence at the time of the testator's death, as joint tenants for life; and the word "issues" was used therein in the sense of "children" and was a word of purchase and not of limitation, but as the gift was for life only, the children born after testator's death could not be let in.—*Held*, [thirdly] that the gift of the residue of the rents and profits for kandoories, &c., was not a charitable gift, but void as tending to a perpetuity.—*Held*, [fourthly] that the gift for clothes to the poor was a good charitable gift, and as the surplus monies with which it was to be paid was sufficiently certain, the gift of the surplus was valid. The testator gave a legacy to Mahomed Mashoredin Merican Noordin and his issue, and directed that if he died without issue, the share was to go over to Abdul Cauder Jellamy and Rajah Bee and their issues in equal shares. He also gave a legacy to Abdul Cauder Jellamy, and directed that in case he died without issue, his share was to go to Mahomed Mashoredin Merican Noordin and Rajah Bee; during the lifetime of the testator, Abdul Cauder Jellamy died without issue.—*Held*, that the words "died, leaving no issue" applied to death in the testator's lifetime, and that the gift to Abdul Cauder Jellamy did not lapse, but the ulterior cross gift took effect as a simple absolute gift. The testator in one portion of his Will devised his lands at Akyab and Tenasserim for certain purposes: in a subsequent part he devised "the rest and residue of his estates at Penang and Province Wellesley or elsewhere [exclusive of those which he had by deed of gift given to his children and grand-children]" for certain other purposes.—*Held*, that there was no inconsistency in the two clauses, as the words "rest and residue" excluded what the testator had already given, and the effect of these words not limited by the parenthetical clause. **FATIMAH & ORS. v. D. LOGAN & ORS.** - 255

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3. —Secondary, of award, same with regard to lost deed, &c. 353

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4. —When a document relating to affairs of State is declined to be produced—it is for the Officer of Government, subpoenaed to produce it,—and not for the Court,—to decide, whether its production would be contrary to good policy, as not conducive to the public welfare. The Indian evidence Act II. of 1855, [s.s. 21 & 23] has not altered the law in this respect. *Beaton v. Skene*, 29 L. J. Ex. [N.S.] 430, followed. The plaintiff subpoenaed the Governor of this Colony, to produce certain documents and correspondence relating to the succession to the throne of the State of Muar, and to certain allowances to be made to the members of the late Royal Family of that State, of whom the defendant was one. A great part of these documents and correspondence had been published in the Blue Book for the information of the general public. Plaintiff, the assignee of a sum of money, payable, under a Treaty to the Sultan of Muar, and which he alleged was the identical sum now being allowed the defendant, commenced an action in this Court, against the defendant, in respect of this sum, and in order to prove the identity of the sum, subpoenaed the Governor to produce the aforesaid documents and correspondence. These papers were brought into Court by the Colonial Secretary, who declined however, to produce them, on the grounds that his doing so, would not be conducive to the public interests, as they related to State affairs, and it would be contrary to good policy to do so.—*Held*, by the Court of first instance, that he could not be compelled to produce the documents.—*Held*, on appeal, by *Ford*, J. that the judgment of the Court below was wrong, and the documents and correspondence should have been compelled to be produced, as the Government by the very fact of publishing the papers and letters in the Blue Book, had given them publicity, and decided the question in favour of their admission in evidence.—*Held*, by *Sidgreaves*, C. J. that the judgment of the Court below was right, and the fact of the publication in the Blue Book, made no difference. The money payable under the Treaty to Sultan Allie, the Sultan of Muar, and by him assigned to the plaintiff was granted by the Tumongong of Johore to him, [Sultan Allie] “his heirs and succes-

EVIDENCE—continued.

sors” in consideration of certain arrangements in respect of the extent of country to be governed by each.—*Held*, by *Ford*, J. [and affirmed by the Privy Council, without expressing an opinion on the other points raised] that on the true construction of the Treaty, the grant did not confer such an interest in the money, upon Sultan Allie, or to enable him to assign it beyond the period of his own life. *ALLAGAPPAH CHETTY & ANOR. v. TUNKU ALLUM, &c.* 520

5. —Stamp 548

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FAILURE OF CONSIDERATION—The maxim *caveat emptor* has no application to a case where the vendor professes to sell a particular article, which turns out subsequently to be, not that article, but some other article altogether: and the vendee is entitled to recover back as money had and received, the purchase money he paid for such particular article, as there was a total failure of the consideration for which it was paid. *WEE KOW v. CHARTERED BANK, &c.* 167

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FAMILY ARRANGEMENT—Chinese document—devise 596

see DISTRIBUTION OF PROPERTY.

FAULTY TITLE—Non-completion of purchase 654

see AUCTIONEER. 2.

FEES—The term “fees” in legal phraseology, means perquisites allowed to public officers as a reward for their trouble. Where therefore, in the table of fees published with the Order in Council of 6th March, 1868, purporting to be made under Ordinance XII. of 1867, s. 1., was an item as follows, “Admission of an Advocate

FEES—continued.

\$50."—*Held*, this was not a "fee" and not one within the powers of the Executive Council, under the said Act, to pass.—*In re ISAAC SWINBURNE BOND* . . . 222

FIXTURES—Mats nailed to the floor, oil-cloth nailed to a stair-case, and punkahs fixed to and depending from the ceiling by ropes and screws, are, both by law, and the custom in Penang, fixtures. Where the plaintiff had purchased a house with its appurtenances, of the defendant's principal paid his purchase money and received his conveyance, and the defendant thereafter removed the aforesaid articles from the house, which were attached thereto in the manner stated.—*Held*, that the articles—in the absence of an agreement to the contrary—passed as fixtures, with the house, under the conveyance, to the plaintiff, and the defendant was liable in trover for their conversion. The Statute of Enrolment, [27 Henry VIII., c. 16] does not extend to this Colony. *BROWN & ORS v. HERRIOT* 43

FOREIGN BILL—The bringing of an action is not a "presentation for payment," so as to require a foreign bill or note to be stamped under section 17 of Ordinance 8 of 1873, before it is received in evidence. The affixing of chops to a promissory note, in lieu of signatures, is a sufficient signature of the note. The Sultan of Acheen, a Sovereign Prince, was indebted to the plaintiff in consideration of plaintiff releasing his claim on him, the defendants promised to pay the plaintiff a certain sum.—*Held*, there was sufficient consideration for the defendants' promise. Where service of a writ of summons could not be effected, by reason of the Court having no jurisdiction to entertain the action.—*Held*, the case fell within section 13, of Act XIV. of 1859, and was not barred, though the note sued on, was more than six years old. Section 13 applies to all cases, whatever may be the length, nature or circumstances, of the defendants' absence from the Colony. *LIM GUAN THEE v. SHAIK AHAMAD BASHAIB & ANOR* . . . 536

FOREIGN MERCHANT—In the absence of a special agreement, the presumption in the case of Foreign Merchants is, that credit is given to the British agent; but that presumption is liable to be rebutted by shewing that credit was in fact given to both principal and agent, or to the foreign principal only. When B. & Co., of Penang [defendants] acting on behalf of a constituent, wrote to their agents H. & Co., of Liverpool to procure certain machinery; and H. & Co., in pursuance of such order, entered into a contract with S., S. & Co., [plaintiffs] for the manufacture of such

FOREIGN MERCHANT—continued.

machinery; and the evidence shewed that S., S. & Co., gave credit to both H. & Co., [the British agents] as well as to B. & Co., defendants, [the foreign principals] and not to H. & Co., exclusively.—*Held*, on the bankruptcy of H. & Co., that S., S. & Co., could recover from B. & Co., the price of the machinery, although B. & Co., had, under the idea that H. & Co., were alone liable to S., S. & Co., paid and settled with H. & Co., the price of the machinery—and notwithstanding that five years had elapsed after the date when the price was due and should have been paid. The fact that the British agent did not communicate to the foreign principal the terms of the contract he had entered into with the manufacturer, and so led the foreign principal to believe that, in accordance with the usage in trade, credit was exclusively given to the British agent,—does not alter the liability of the foreign principal if credit has been given him as above—as it was no part of the duty of the manufacturer to convey that information to the foreign principal, but of the British agent only, and for whose omissions in that respect the principal should suffer. *Kymer v. Suwercrop*, I. Camp. 109, distinguished. If an agent exceeds his authority, his acts, only in so far as they are in excess of authority, are void: but the rest thereof, as are within his authority, will stand, though connected as one transaction with the excess. *SCOTT, SINCLAIR & Co. v. BROWN & Co.* . . . 85

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- GIFT**—Property in trust—license—perpetuity 326
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2. —A gift to a person for the benefit of a temple is a good charitable gift and one the Court will carry out. A gift of money to an idol for the benefit of a temple is void as being an absurdity and not a charity. **ATTORNEY-GENERAL v. THIR. POOREE SOONDEREE** 377

3. —A gift of an estate in lands, which is attempted to be controlled by restraint against alienation, is not void in its entirety but the restraint alone is void, and the gift will be upheld as if the restraint had never been imposed. A testator, so far as could be gathered from the language of his Will, devised lands to trustees in trust for 60 years, to receive the income therefrom, and divide the same among his four children, but strictly restrained the trustees and beneficiaries from alienating the said lands during that period. He further provided, that on the death of any children leaving issue, such issue should take their parent's share.—*Held*, that the gift for 60 years and restraint on alienation was void, that the children took equitable estates in fee, free from all restrictions. The testator directed that \$20 per year, from the aforesaid income before the same was divided among his children as aforesaid, should be sent to his country, without specifying to whom the money was to be paid, or for what object.—*Held*, the gift was void, on the ground of uncertainty. **KADER BEE & ANOR. v. KADER MUSTAN & ORS.** 432

GOODS—The Statute of Frauds, 29 Car. II. c. 3, is law in this Colony. Where goods are agreed to be sold, but no memorandum of the sale, is had, or part payment of money is made,—the mere fact that the goods, not weighed or measured, is left by the defendant, with the plaintiff simply for his [the defendant's] own convenience, and on the bills for their value being presented promised to pay it in a few days,—do not constitute "an acceptance and receipt of the goods, or part thereof," within section 17 of the Statute. **REVELY & CO. v. KAM KONG GAY & ANOR.** 32

2. —Appropriation of,—final and irrevocable act 164

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3. —A memorandum for goods sold to the value of ten pounds or upwards, in order to satisfy the Statute of Frauds, must

GOODS—continued.

contain the names of the vendor and purchaser, the terms of the sale, prices of the goods, and must be signed by the person to be charged [vendor or purchaser as the case might be]; otherwise no action can be maintained thereon. A Solicitor who signs and sends a notice on behalf of his client, demanding delivery of goods sold, is not an agent for signing a contract of sale so as to bind his client and make the notice [which otherwise may contain all the requirements of the Statute] a memorandum with the Statute. **HOOGLANDT v. MAHOMED ISUP & ORS.** 184

4. —Warehousemen—negligence—privity of contract 190

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5. —The limitation to an action for goods sold and delivered, where there is no writing, other than receipt for the goods, is 3 years under sub-section 9, Clause I. of Act XIV. of 1859, as the non-payment of the price of the goods, is merely a breach of contract. **TUNKOO MOODA NYAK MALIM v. KHOO TEAN TEK & ORS.** 453

6. —Marine Insurance—excessive valuation 482

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7. —Breach of Contract for non-delivery of,—Knowledge 491

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9. —Landing of,—master or agent of ship—liability—lighterage 640

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10. —Sale of specific—implied warranty 667

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ing place—user . . . 277

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HINDOO LAW—According to *Hindoo*
Law, a wife's property, real and personal,
is her separate property. A Hindoo man
and woman, intermarried according to Hin-
doo Law and custom; the wife at the time
possessing some personalty, and during the
coverture, acquiring realty from her rela-
tives.—*Held*, the parties must be taken to
have contracted on the footing of the Hin-
doo Law, and that both the personalty and
realty were hers, subject to being taken
possession of by the husband, under stress
of circumstances only. *Huwah v. Daud*,
Straits Law Reports, p. 253, followed. The
husband in such a case, acquires no interest
in such property except as trustee for his
wife; and for breach of his duty in that
respect he might be sued, and this Court
will respect the wife's rights, although
there is no marriage settlement. The wife
has such a right of action against her hus-
band, whether she be divorced or not; and in
a pauper case, is at liberty herself to sue,
without the intervention of a next friend.
POOTOO v. VALEE UTA TAVEN & ANOR.

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HINDOO TEMPLE—see **GIFT**. 2. . . 377

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temple . . . 377

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IMMOVEABLE PROPERTY—The Sta-
tute 3 & 4, Wm. IV., Cap. 27, is law in this
Colony. In cases of immoveable property,
or any interest therein in the nature of
chattels real, the limitation imposed by
section 1, clause 12, of the Act XIV. of
1859, runs against the administrator of a
deceased person, from the date of the death
of the intestate, as if there was no interval
of time between his death, and the grant of
Letters of Administration. *JEMALAH v.*

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IMPLIED CONTRACT—Wharfinger—
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INDIAN ACTS—see **ACTS**.

INFANCY—If a person is aware he is
under 21 years of age, but is ignorant at
what age infancy by law ceases, and in
such ignorance enters into a contract with
another without disclosing the fact of his
being under 21, this is not such a fraud on
his part, as will estop him from applying
to a Court of Equity to set aside such con-
tract. The defence of being a purchaser
for value, without notice, is not available
unless specifically set up by the plea or
answer. *MAH KEOW v. CHEAH HIT &*
ORS. . . . 321

INFECTIOUS DISEASE—see **BREACH**
OF PROMISE . . . 63

INHERITANCE—From the time of the
introduction of the Charter of 1807, up to
the date Act XX. of 1837 came into opera-
tion, the English law of Inheritance was
the law of this Colony. *Rodyk v. William-*
son and *In the Goods of Abdullah* approved
of. Act XX. of 1837 is retrospective, except
as to existing interests which come within
the provisos thereof. Where therefore the
defendant's ancestor held lands at Malacca
under a Dutch grant, which had been lost,
and the original entries in the Dutch
records were not to be found—but, after
the English had taken Malacca, in an agree-
ment made in 1828 between the English
authorities and the defendant's ancestor,
“the grants issued by the preceding Local
Government in 1731 and 1738” were expres-
sly recognized,—undisputed acts of owner-
ship by the defendant's ancestor distinctly
recited and a covenant made by the English
authorities with the defendant's ancestors
“and his heirs for ever, so long as the
“Settlement of Malacca remains under the
“British Flag.”—*Held*, in the absence of
evidence to the contrary, that there was a
presumption that the original grants were
in the nature of a fee simple; that the
ancestor having died before 1837, the lands
passed to the defendants as his heir, and
fell within the proviso of the Act XX. of
1837, as a transmission according to the
rules which regulate freehold property.
MORAISS & ORS v. DE SOUZA . . . 27

INJUNCTION—Perpetual—*Wyang or*
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INSOLVENT—Payment or gift by, on
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above composition . . . 162

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INSOLVENT—Where plaintiff,—stay of execution 512

see STAY OF EXECUTION.

INSULT—see CONTEMPT OF COURT. 1. 4

INSURANCE—The plaintiff having, according to the usual Chettys' Insurance, undertaken the Insurance of the defendants' Brig "Woodbine" for certain voyages within a given period, afterwards in consideration of an extra rate of premium for three months, paid him by the defendants, granted the defendants license to deviate from the voyage originally insured against. The license to deviate was in writing, but beyond mentioning that the voyage was to be a single voyage to the particular port and back, and that three months' extra premium had been received, made no further mention of time. It stated that the "risk" was to be the same as that mentioned in the original policy. The vessel sailed to Rangoon, and on her way back was lost, by perils insured against; but at the time she was lost, the three months for which extra premium had been paid had expired, but the original time mentioned in the policy was still unexpired. The defendants had not paid extra premium for the period between the termination of the three months and the loss of the vessel.—*Held*, the license did not limit the voyage to three months—that "risk," included the original time, and the vessel being lost within the original period, by perils insured against, the same was covered by the policy. *VERAPAH CHETTY v. LIM SWEE CHOE & ANOR.* 378

INSURANCE ON GOODS—Excessive valuation 482

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INTEREST ON JUDGMENT—The Court will not allow interest on a judgment, for any interval of time intervening between the date of judgment, and payment thereof. The Statute 8 & 9, Wm. III., c. 11, s. 8, does not apply to a simple money bond. *BROWN & ANOR. v. KAM KONGAY & ANOR.* 73

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———Action of Trespass—Estoppel 242
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———Arrest before,— 354
see ARREST BEFORE JUDGMENT.

———Creditor — security — promissory-note 355

see MORTGAGE. 2.

JUDGMENT DEBTOR—The mere fact that a judgment debtor, in order to defeat an expected execution, transfers his property to another creditor, with a view of preferring that other creditor to the execution creditor, does not render the transfer fraudulent and void under the Statute, 13 Eliz. c. 5. Notice of claim by a third party, to property seized, given to the execution creditor, is notice to the Sheriff; and notice to the Sheriff, thereof, is notice to the execution creditor. Seizure and sale by the Sheriff is, but one act and one conversion, and where the execution creditor indemnifies the Sheriff; it is joint act of both.—*Semble*. It is not necessary to serve the Sheriff, who seizes the property of a third party as property of the judgment debtor, with notice of the claim of such third party, in order to render the seizure and sale thereunder, a conversion. *SYED ABBAS, &c., v. SCOTT & ANOR.* 64

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see AFFIDAVIT. 2.

JURISDICTION—Military tribunal—Court-Martial 1

see MILITARY LAW.

2. —The words in the Charter of 1826, defining the Civil Jurisdiction of the Court over "all pleas the causes of which shall or may thereafter arise against any persons who shall be resident within the Settlement," mean resident at the time of action brought, and not at time the cause of action arose. Where therefore the defendant and plaintiff entered into a contract for the sale of certain chests of opium at Sambas in Borneo, where they were both resident at the time, but after the defendant had committed a breach there, they both came to this Settlement, where the plaintiff sued the defendant.—*Held*, this Court had jurisdiction to entertain the suit. Where a Foreign Sovereign Prince sues in the Courts of this Colony, a person resident here, the Court in compelling the defendant to answer, will couple with the order, that the Sovereign Prince will submit to the jurisdiction, in case of a cross action, so that the remedies might be mutual. *The Columbian Government v. Rothschild*, 1

JURISDICTION—continued.

SIMON 84, followed. SULTAN OMAR AKAMODEN v. NAKODAH MAHOMED CASSIM 37

3. —A Foreign Sovereign cannot be sued in the Courts of this Colony, simply because he happens to be a natural born British subject according to our own law, if he has not acted, or done anything by which it might be inferred that he acted as subject. In a suit against such an individual, it is not necessary to aver in the bill or declaration, that he is subject to the jurisdiction of the Court. This is a matter that should come from him, and if in his plea he does not say he is exempt from the jurisdiction, it must be presumed that he is not so exempted.—*Query*. Whether a person, after he has been once recognised by the British Crown, as an independent Sovereign, can thereafter be considered a subject of that Crown? **NAIRNE v. RAJAH OF QUESDAH & ANOR. 145**

4. —Supreme Court no.—for restitution of conjugal rights among non-Christians 236-335

see CONJUGAL RIGHTS. 1. 2.

5. —A Foreign Sovereign Prince, who remains in this country for a protracted time, is entitled to no greater exemption from the jurisdiction of the Courts of this Colony, than his Ambassador would have been: and if he engage in mercantile transactions, such as borrowing money in his private capacity, on a promissory note, he is liable to be sued thereon in such Courts, and cannot claim exemption on the grounds of his being a Sovereign. **ABDUL WAHAB, &c., v. SULTAN OF JOHORE 298**

6. —Mahomedan Law—Divorce of wife by Kali 438

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7. —Sum within,—of Court of Requests recovered in Supreme Court—costs 472

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8. —Service of summons out of 476

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9. —Foreign Sovereign unless recognised not exempt from 539

see WRIT OF ARREST.

10. —*see also* FOREIGN SOVEREIGN—SOVEREIGN.

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see NEGLIGENCE. 4.

KNOWLEDGE—continued.

2. —*see* ASSESSMENT. 3 587

3. —The presumption that an agent has communicated his knowledge of certain facts, to his principal, is rebutted, if in such transaction, the agent is committing a fraud, which makes concealment of such facts from his principal, necessary. Where therefore one and the same person was employed by both plaintiff and defendant as a scrivener to invest their monies and prepare the necessary papers for them, and the agent having got possession of the title-deeds from the defendant, the first mortgagee thereof, in disobedience to the express instructions of his principal, [the defendant] to take a re-mortgage of such property—went with the said deeds to the plaintiff, and obtained a loan from him, on the mortgage of such property, as a first mortgage, but never, in fact, communicated to the plaintiff, the existence of the defendant's mortgage, and never returned to the defendant's mortgagor, his mortgage bond, or paid the defendant the amount, he [the agent] had received thereon, but appropriated the monies obtained on the mortgage from the plaintiff, and also made false entries in his accounts with the defendant, of such a re-mortgage to him of the same property, but by some fictitious person.—*Held, Kennedy v. Green, 3 M. & K., 699, applied, and the knowledge of the agent could not be imputed to the plaintiff, so as to affect him with implied or constructive notice; and he was therefore entitled to the possession of the title-deeds as against the defendant, the first mortgagee. CLUTTON v. MCGILLEVEY 619*

LABORER—Assessment of dwellings 587

see ASSESSMENT. 3.

—*see also* Wages 479

LAND—A person in possession of land, is liable to the Crown for quit-rent accrued during the time of his predecessors in title. The possession of receipts for quit-rent for a later period than that claimed, raises a presumption in law that the previous rents had been satisfied, which presumption, unless rebutted, is sufficient to debar the Crown from recovering such previous rents. **EAST INDIA CO. v. BROWN 3**

2. —Held at Malacca under Dutch Grant—English Law of Inheritance—Charter of 1807 27

see INHERITANCE.

3. —The right that the Government has to distrain for arrears of quit-rent, does not deprive them of their rights to sue the tenant at law for the rent: the remedies are cumulative. Where a person has, on accepting a grant of land from Government, covenanted to pay quit-rent annually,

LAND—continued.

without any exception as to circumstances, he is bound to pay the rent, although the lands may subsequently turn out useless, and are abandoned by him. *EAST INDIA Co. v. Low* 73

4. —Assessment 75

see ASSESSMENT. 2.

5. —Cancellation of Deed—Compensation 119

see BOUNDARIES. 1.

6. —The Crown, under the Malacca Land Act 26 of 1861, has power to commute the tenth payable in kind by land-holders in that Settlement, into a money payment; and that, whether the land-holder be a "prescriptive tenant" or not. *Query*.—What is a "prescriptive tenant" in Malacca, and within the aforesaid Act? *ATTORNEY-GENERAL v. DE WIND* 303

7. —The boundaries and abutments of a piece of land mentioned in a deed, are the only things by which a person must be guided in ascertaining the land: and parol evidence, to shew that the boundaries are wrong, and to contradict the deed, is inadmissible; even if in and by the deed itself, the area of the land agrees with the story of the person who wants the evidence admitted. Land set aside by a deed as Wakoff, for the burial ground of the donor, and his family and relations, is not a charity, as it is not for the benefit of the public, and is therefore void. The Indian Cases to the contrary are no authorities here. —*SHAIK LEBBY v. FATEEMAH* 324

8. —Where two holders of lands under Government permits, arranged among themselves that a certain stream running through the land of one of them should be the boundary of their respective lots, and by this means the one through whose land the stream passed was depriving himself of a certain strip of land included in his permit and giving up the same to the other of them, and the one so depriving himself of the said strip died, leaving an Executor who sold his interest in the permit to the plaintiff, who, on production of the permit to the Land Office, obtained a grant in fee from the Crown, of the whole land comprised in such permit, including the strip so given up, and thereafter sought to eject the other permit-holder from the strip so given up to him.—*Held*, that the fact of the plaintiff being a grantee in fee from the Crown, made no difference, but the plaintiff acquiring the grant on the strength of the permit, purchased as aforesaid, was bound by the arrangement made by his deceased predecessor, and could not recover possession of the said strip. Where a

LAND—continued.

permit was issued under a Government Notification of 1852, which Notification could not be found, and the permit-holder subsequently obtained from the Crown a grant in fee of the land comprised in the permit.—*Held*, that it must be presumed that the Notification gave the permit-holder right to the land *in fee* on certain conditions which had been complied with and not an estate *for years* under Act 16 of 1839. *DANIEL LOGAN v. HEOH AH TAN* 514

9. —Increase in value—breach of agreement 582

see CONTRACT. 10.

10. —A suit brought under section 15 of Act 14 of 1859, for recovery of land from which the plaintiff has been forcibly dispossessed, is not "a suit for the recovery of land," within the meaning of the section 165 of the Civil Procedure Ordinance V. of 1878; and a defendant in such a suit cannot therefore merely plead that he is in possession, but must deal with the several allegations in the statement of claim, and disclose his defence in his statement of defence. *TAN HOON CHEANG & ORS. v. HEEVEY* 652
LANDING-PLACE—From the sea-side—highway 277

see RIGHT-OF-WAY. 2.

LANDLORD—Rent in advance—lease—distress 555

see RENT. 3.

LANDLORD AND TENANT—The rule that a tenant is estopped from denying his landlord's title, applies to every case of landlord and tenant, irrespective of the character in which the landlord acts. Therefore, where A took certain land on a monthly rental from B, both parties believing the land to be Mosque land, and B then acting as trustee of such land; but it afterwards appeared the land was not Mosque land, but the private property of B's grandfather, whose Executor B was; and B thereupon sold the land as the private property of his grandfather.—*Held*, that B's assignee, C, under such sale, could recover such lands in ejectment from A, who was estopped from denying B's title as such Executor to such land, and also the title of his assignee, C.—*AMEERAN v. CHE MEH, alias ISMAIL*. 429

LAW OF ENGLAND—Introduction of,—into Colony by Charter 1807 255

see ENGLISH LAW. 3.

LEASE—Expiring of—payment of rent—letting from month to month 637

see TENANT. 2.

—*see also* RENT. 3. 555

LEAVE TO SUE—Where the Court has once given leave to plaintiff to commence

LEAVE TO SUE—continued.

his suit in a Settlement, under section 65 of the Civil Procedure Ordinance 1878, it will not, as a rule, vary the order—especially where proceedings have been commenced thereunder. **GOTTLIEB v. HERVEY** 500

2. —Pauper action—*see* **ADMINISTRATOR**. 2. 602

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see **ATTORNEY**.

LETTERS OF ADMINISTRATION—
Recovery of title deeds 171
see **ADMINISTRATOR**. 1.

———Revocation of,—ecclesiastical proceedings 601
see **ADMINISTRATION**. 1.

LIBEL—It is no defence to an action of libel, that the article was copied from an English newspaper which had been some months already in circulation, and was a Report of a debate in the House of Commons, on a matter of interest in this Colony. The defendant, the Editor of a newspaper, knowing that the article contained certain libellous statements against the plaintiff, intended, in publishing such debate, to have omitted such libellous statements. He handed the newspaper to his printer with the debate marked out, but without any instructions as to the libellous statements, intending himself to correct the proof sheets, and then to strike out these passages. Through an accident, he omitted to correct the proof sheets, which were revised by the printer only, and published *in extenso*.—*Held*, he had shewn great carelessness and a want of due regard for the feelings of others; and \$200 damages, with costs, were awarded against him.—**MILES v. LOGAN** 80

2. —The defendant having received an impertinent message from the plaintiff in reference to another matter altogether, in a spirit of resentment wrote an anonymous letter to the Superintendent of Police, charging the plaintiff with having poisoned his late wife, and expressing a hope that he would be taken into custody, and the matter enquired into. At the trial the defendant could not, and in fact did not attempt to, prove the truth of his assertions—he, however, gave evidence of certain facts which were suspicious attending the woman's death, and that reports to the same effect as that stated in the letter, were generally circulating in town, concerning the plaintiff.—*Held*, the communication was not privileged, and the defendant was liable in damages for libel.—**MURSHOODIN MERICAN NOORDIN v. SHAIK EUSOOF** 390

LIBEL—continued.

3.—Comments upon proceedings in a Court of Justice, though reflecting on the character and evidence of a witness examined therein, are privileged, if made in a fair spirit of discussion, and not recklessly, and without regard for truth. The plaintiff had been examined as a witness in a certain proceeding in Court, and gave evidence which was, not only at variance with the sworn testimony given by other witnesses, but difficult for one to accept as correct. The Judge who tried the case, in delivering judgment therein, adopting the facts as spoken to by such other witnesses, commented in somewhat strong terms on the conduct and evidence of the plaintiff, but not so as to irresistibly lead one to the conclusion that the plaintiff had deliberately perjured himself. The defendants in a public journal, in referring to the case deliberately charged the plaintiff with having "lied" on that occasion, and on being sued for libel, justified [without attempting to prove the truth of the assertion] that the article complained of was no more than a fair comment on the proceedings in Court.—*Held*, it could not be so considered, and was in excess of the right of free and fair comment.—**CARGILL v. CARMICHAEL & ANOR.** 603

LICENSE—A testatrix directed that in the event of the plaintiff not wishing to live in a certain family house provided by her, he and his family should be allowed to occupy free of rent, for 40 years, certain other premises, after which period, these latter premises were to be his or his heirs or assigns, but neither he, nor they, were allowed to mortgage or sell the same.—*Held*, the plaintiff and his family had only a license to live in the house, and that a personal occupation was required. The Court, however, declined to express an opinion as to who the word "family" included, considering that it would be premature to do so. **LIM MAH YONG v. J. A. ANTHONY & ORS.** 475

LICENSE TO DEVIATE—Chetty's Insurance—risk 378

see **INSURANCE**.

LIEN—A hotel-keeper has a lien on his lodger's clothing and goods, for unpaid bills, and incurs no liability in detaining the same under such circumstances. **WYNDHAM v. HANSEN** 618

LIEN FOR FREIGHT—Courts of Law, for the benefit of commerce, have always had a leaning in favor of the right of a ship-owner to a lien for freight, on goods shipped on board his vessel; and with that object, where a vessel is let on charter, draw a distinction between cases where the

LIEN FOR FREIGHT—continued.

ship itself is let out, [in which case possession of the ship is parted with, and there is no lien on the part of the ship-owner]—and cases where the mere carriage, or space of the ship is let out, [in which case the owner still retaining possession of the ship, retains a lien for freight]. The language of the charter-party must be very strong, in order to exclude, under any circumstances, the lien of the ship-owner; mere words of letting and hiring appearing therein, will not themselves do so, where the other provisions shew they are used as mere words of contract for the capacity of the ship, and not a demise of the entire hull. Where S. W. & Co., merchants of London, chartered of A. A. owner of the barque *P.*, the said barque for a voyage from London to Singapore or Rangoon and back, for a fixed sum for freight which was to be paid by S. W. & Co's acceptance at 3 months, and S. W. & Co., put up the ship as a general ship and thereby procured shipment of goods on freight, by several persons, and themselves also shipped goods therein, which they consigned to the plaintiffs for sale, drawing in advance on the plaintiffs against the value of the said goods; and thereafter the barque proceeded on her voyage with A. A., the ship-owner's Captain and crew on board, and safely reached Singapore with the said goods on board; but before she arrived, S. W. & Co., became bankrupt, and the Bill of Exchange given for the freight, and accepted by them, was dishonoured, whereupon the defendant, the Master of the barque, acting on behalf of A. A. the ship-owner, refused to give up to the plaintiffs, the goods of S. W. & Co., consigned to them, whereupon the plaintiffs sued him in trover therefor.—*Held*, that the ship-owner had a lien for his freight, which was only suspended by his taking the bill, but revived the moment it was dishonoured, as the cargo was then still in his possession through his servants.—*Held also*, that if the ship-owner [A.A.] had, on receipt of the bill, negotiated it for value, but in a way not to render himself liable thereon, it would have operated as payment of the freight, though the bill was afterwards dishonoured; but as he had negotiated the bill, and as indorsee remained personally liable thereon, the taking of the bill, and negotiating it, did not operate as payment, when the bill was subsequently dishonoured. *D'ALMEIDA & ANOR. v. GRAY* . 109

LIFE ESTATE.—Where certain persons were entitled to life estates in certain premises, but during the continuance of such life estate, the Municipality, under Act V. of 1857, took possession of the premises for a public purpose, and paid compensation

LIFE ESTATE—continued.

therefor.—*Held*, the life estates were not thereby put an end to, but the tenants for life were entitled to an apportionment of the compensation paid, in respect of their life interests. At the time the arbitrators were making their award as regard the compensation to be paid for the premises taken, the life tenants waived their claim to apportionment, and requested the arbitrators to make none in respect of their life interests: they subsequently, in this suit, claimed apportionment.—*Held*, they were entitled to same. A testator gave all his property, real and personal, to his executors upon trust to sell the same, [excepting certain houses] and then gave certain specific legacies out of the proceeds of such sale, and gave "the rest, residue, and remainder of his property" to certain charitable objects—with respect to the premises, he then proceeded to direct, that these should be kept for certain purposes. Those purposes, except as to a small portion, failed to take effect and were void.—*Held*, the houses, on termination of the purposes for which the small portion took effect, did not thereafter, fall into the residuary clause: that the residuary clause was of a limited character; and the houses, except as aforesaid, were undisposed of. These houses having been taken over for a public purpose and compensation paid therefor, and this compensation apportioned among the persons entitled to life interests, [which was the small portion which took effect.]—*Held*, the residue of the proceeds or compensation, also did not fall into the residuary clause, but was undisposed of. The testator died without any known next-of-kin, but by his Will had devised his property to Trustees upon trusts, which were either incapable of taking effect, or were void.—*Held*, the property was undisposed of, and notwithstanding the presence of the Trustees, escheated to the Crown. *Read v. Steadman*, 26 Beav., 495, followed; *Sweet v. Sweet*, 33 L. J. Ch., N. S. 211, distinguished. When costs of all parties are given out of the testator's "general estate," every portion of such estate is liable to contribute towards such costs. *OH WEE KEE v. BOON BONG NEOH & ORS.* 544

LIGHTERAGE—Landing of goods—agent—master 640

see **BILL OF LADING.**

2. —A person who comes by goods of another by accident or mistake, is liable for gross negligence in keeping the goods; but the damages recoverable against him, are only to the extent of the then plaintiff's interest in the goods. Where therefore the defendants, lightermen, by mistake or ac-

LIGHTERAGE—continued.

cident took delivery of certain goods which they conveyed in their boat, but owing to the unseaworthy condition of the boat, the goods were damaged and rendered wholly useless.—*Held*, the plaintiffs, the proper lightermen for those goods, were entitled to maintain an action against, and recover damages from, the defendants, but only to the extent of the loss of the hire they would have earned, had they lightered the goods. The owner of the goods had, in a previous action, on the evidence then adduced before the Court, recovered as damages from the plaintiff, the proper lightermen, the value of the goods so damaged as aforesaid, which damages, together with the cost of that action, the plaintiff paid. The plaintiff, the proper lighterman, then sued the defendants to recover as damages, the value of the goods, or the full amount, with costs, he had had to pay.—*Held*, the plaintiff could not recover. Where a case is a fit one to be tried in this Court, the plaintiff, although he eventually therein recovers a sum within the jurisdiction of the Court of Requests, will not be deprived of his costs as in an ordinary suit in this Court. **EBRAHIM v. SHAIK ALLY & ORS.** 672

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see **GOODS.** 5.

———**Claim barred—service of summons out of jurisdiction** 476

see **WRIT OF SUMMONS.**

LIS PENDENS—A sale of property during a *lis pendens* is void altogether; but if the property was, prior to the *lis pendens*, subject to a charge or mortgage, such charge or mortgage is not affected by the *lis pendens*. If the purchaser of such property during the *lis pendens*, redeems the charge or mortgage as part of the means by which he pays his purchase money, he will,—[although he may have taken a conveyance direct from the party engaged in the *lis pendens*, which conveyance makes no reference to the redemption of the charge or mortgage—and, although he takes no assignment of the charge or mortgage from the original party holding the same]—be entitled to a lien over the property, the subject of the *lis pendens*, up to the extent he redeemed the prior charge or mortgage. **LEE AH YIM v. CHEO AH MO & ORS.** 388

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MAHOMEDAN LAW—Concubines as witnesses in cases of divorce 255

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2. ———**Divorce of wife by Kali in absence of husband** 438

see **DIVORCE.** 3.

3. ———**CHARITY LANDS** 500

see **CHARITY.** 4.

4. ———The plaintiff claimed to be Khatib and Emam [priest] of a Mahomedan mosque, of which his ancestors were formerly priests,—on the ground that the office of priesthood was hereditary, according to Mahomedan Law. He sued the defendant, the present priest, and claimed to be restored to his alleged office, and an injunction restraining the defendant from so officiating.—*Held*, that the defendant could not be sued, and demurrer allowed. The words "Mahomedan Law," in section 27, clause 2, of the Mahomedan Marriage Ordinance 5 of 1880, must be read as the "Mahomedan Law of property;" the generality of the expression in clause 2, is restricted by the preamble, and context at end, of the clause. **JAMALUDIN v. HAJEE ABDULLAH** 503

MAHOMEDANS—see CHARITY. 4. 500

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see **PROMISSORY NOTE.** 1.

MALFEASANCE—Misfeasance—Res-judicata 663

see **PRINCIPAL AND AGENT.**

MALICE—By section 29 of Act XLVIII of 1860, in an action against a Police Officer for any thing done, or intended to be done, by him in the execution of his duty, it is not only necessary to allege in the pleadings that he acted maliciously and without reasonable and probable cause, but it must clearly be made out, by evidence, that the officer so acted. Therefore, in an action against a Punghulu for assault and false imprisonment, although it was clearly proved by the plaintiff that he was assaulted and imprisoned, and that the defendant in so acting against him, had no reasonable or probable cause, yet, as no actual malice on the part of the Punghulu was shewn, the defendant had judgment with costs. **KO BO AN v. PUNGHULU SHAIK BEERAN** 273

2. ———**Privileged communication** 418

see **SLANDER.**

MALICIOUS PROSECUTION—In an action for malicious prosecution, it is no defence to say, that the defendant acted on what he was told. Before laying a criminal information, he is bound to enquire, and test the information given him; and if he neglects to do so, he acts without reasonable and probable cause. *CHEAH OON HEAP v. CHOAK KONG WHAT* . . . 393

2. —A belief founded on the information of a credible witness, of facts imputing of guilt to another, is sufficient, reasonable and probable cause for a prosecution of such other on a criminal charge; but that must be a belief which would be entertained by a reasonable and discreet mind. Where, therefore, the defendant, acting on the belief, as he alleged, of certain information given him by his servants—natives of the servile class, and one of whom had been previously convicted of theft [and whose information the Court was satisfied was entirely false] wrote to the plaintiff, threatening to prosecute him for theft, unless he returned two geese which the defendant [on the information of his servants] claimed to be his,—or producing, within a given time, evidence of their not being his [defendants'] property—and in reply, received a letter from the plaintiff, denying the truth of the information given by the servants,—claiming the geese—offering to call the man from whom he purchased the birds—and warning the defendant of the consequences of carrying out his threat, and in return stating the defendant was liable to be prosecuted for defamation, and the defendant, being irritated at this, did not wait till the time appointed, or call on the plaintiff, but went off and procured [in spite of further warnings, by the magistrate's clerk, based on the plaintiff's known character and position.] a warrant from the magistrate, on which the plaintiff was taken into custody; and thereafter charged the plaintiff before the magistrate, with being in possession of stolen property, and obtained a remand, but at the adjourned hearing, withdrew the charge without offering any evidence in support thereof.—*Held*, that the circumstances of the case were not such as should have actuated a reasonable and discreet mind to have acted on the information of the servants—that the case as a whole, shewed there was a want of reasonable and probable cause, and actual malice,—and the defendant was liable in damages. On appeal this decision was affirmed. *Perryman v. Lister*, 4 L. R. Eng. & Ir. Ap. 521, distinguished. *NELLIGAN v. WEMYSS & ANOR.* . . . 629

MANUFACTURER—Vendor—Sale of goods—Implied warranty . . . 667

see **CAVEAT EMPTOR.** 2.

MARINE INSURANCE—A person effecting a Marine Insurance on goods, may insure for an amount over and above the actual value of the goods, to cover charges and a reasonable valuation for profits; but an excessive valuation for profits, is a material fact to the risk of the policy and should be disclosed to the insurers. The non-disclosure of an excessive valuation, is a ground for avoiding the policy altogether. *Ionides v. Pender*, 9 L. R. Q. B., 531—discussed. *TAN TYE & ANOR. v. UNION INSURANCE SOCIETY OF CANTON* . . . 482

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see **AUCTIONEER.** 2.

MEMORANDUM OF SALE—Goods sold—Statute of Frauds . . . 32

see **GOODS.** 1.

MERCANTILE LAW—By section 6 of Ordinance 4 of 1878, Mercantile Law generally, as it exists in England at the corresponding period, is law in this Colony, and that, whether such mercantile law is by Statute or otherwise. Although by section 26 of Ordinance 8 of 1880, the Indian Act 14 of 1840, has ceased to be law in this Colony, by force of section 6 of the Ordinance 4 of 1878, the English Statute 9, Geo. IV., c. 14, on which that Act was drawn, applies. Contracts made in this Colony for goods not in *esse* at time of such contract, are within section 17 of the Statute of Frauds, by the aforesaid Statute 9, Geo. IV., c. 14. *PENANG FOUNDRY CO. v. CHEAH TEK SOON* . . . 559

2. —*see also* **TRADE-MARK** . . . 650

MERCHANT SEAMEN—Injury by Public Officer—Merchant Shipping Act 1 of 1859 . . . 186

see **PUBLIC OFFICER.** 1.

MILITARY LAW—A “Khidmiggur,” or table-servant, to a Military officer stationed at the Settlement in time of peace, is not a “camp-follower,” and is not subject to military law, nor liable to be tried by Court-martial. No man is subject to military jurisdiction, but an officer, soldier, or sepoy, or some one connected with the army; nor

MILITARY LAW—continued.

is any offence cognizable by the military tribunal, or within its jurisdiction, but some act which is a breach of military duty or a neglect of military discipline; and no military person is liable to punishment for breach of military law or discipline, except in consequence of a trial, and the sentence of a Court-martial. By the Charter of 1807, not only was the English Criminal Law extended to this Colony, but civil injuries are to be redressed according to English law; and that even as regards offences or wrongs, committed or done, before the Charter. *KAMOO v. BASSETT* . . . 1

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see **INTEREST ON JUDGMENT.**

MONEY HAD AND RECEIVED—Duty 595

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MORTGAGE—of Chattel without deed 201

see **CHATTEL.**

2. —In an action by a judgment-creditor to redeem three mortgages, and to have the fourth declared void as having been taken after judgment in plaintiff's favour,—the bill of complaint stated, that defendant had told plaintiff he had a promissory note for the money, but took the fourth mortgage as a better security, but defendant, at time of taking such mortgage, had notice of the action pending. The bill did not deny the consideration for the note. On demurrer, it being said by plaintiff that there was no consideration for the note, and the defendant asserted that there was,—the Court overruled the demurrer, and ordered the defendant to answer, so as to do complete justice between the parties.—*Semble*. It is no fraud for a creditor, secured by a promissory note, to take a mortgage in lieu thereof, even if meant to defeat a judgment-creditor, of such his debtor, either at law or in equity. *Query*. Is notice of an action pending constructive notice of the judgment? *Query*. In a suit by a judgment-creditor against a mortgagee, to redeem the mortgage, must the mortgagor, [the judgment-debtor] be made a party? *Query*. Whether the prayer "that justice may be done as the case shall require," is equivalent to a prayer for general and further relief? *MUNGOOTEE MEERA NINA v. ATHEAN* 355

3. —Sale of Property—*lis pendens* 388

see **LIS PENDENS.**

MORTGAGE BOND—Covenant in,—fraud 467

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NEGLECT OF DUTY—Money had and received 595

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NEGLIGENCE—Warehousemen—Privity of Contract 190

see **WAREHOUSEMEN**

2. —Trover—Conversion 230

see **PRIVITY OF CONTRACT. 2.**

3. —Criminal Information — reasonable and probable cause 393

see **MALICIOUS PROSECUTION. 1.**

4. —A person who knows a parcel contains a particular kind of articles, which are of appreciable value, but, on asking its value, is not told same, but who nevertheless accepts, without reward, such parcel to transmit to another, is bound to use "such care and diligence, as persons ordinarily use in their own concerns, and such "knowledge and skill they have." His duty under such circumstances is, to return the parcel to the person who gave it to him, or keep it till he can communicate with that person, or the person to whom it is to be transmitted; but his accepting such parcel and thereafter handing it to the carrier, without taking a parcel receipt, bill of lading or other security therefor, is strong evidence of negligence, directly or proximately, resulting in the loss of such parcel, and for which he is liable. His handing it to his clerk to hand to the carrier, without telling his clerk that the parcel contained valuables, who, in consequence, did not inform the carrier thereof, is an additional element of such negligence.—*S. A. VAN SOMEREN v. BOON TEK & Co.* . . . 427

5. —Implied Contract—goods overlanded—cargo 461

see **CONTRACT. 7.**

6. —Nuisance—repairs of roads and bridges—Municipality 561

see **ROADS AND BRIDGES.**

7. —In order to enable a plaintiff to recover damages for loss alleged to be due to the negligence of the defendant, it must be clearly proved and without reasonable doubt, that the loss is attributable to the negligence. So where the defendants in repairing a boat for the plaintiff, repaired the same negligently both as regards the materials and workmanship; but such defect was a fair height above the load line of the boat when on an even keel; but the boat sunk one morning, shortly after the repair had been executed, while at anchor, lying on an even keel on a fair calm day, so that the defects were above water, and the sinking of the boat could not be reason-

NEGLIGENCE—continued.

ably attributed to it,—and although it was not shewn that there was any other defect in the boat, or any other cause which could have led to her sinking.—*Held*, the plaintiff could not recover from the defendants, the loss occasioned by such sinking of the boat. On appeal this decision was affirmed.—*Held* also, [by the Court below] that although the negligence in the defendants' repairs necessarily hastened the sinking of the boat, after the defect had got below the level of the water, yet, unless the sinking could be shewn to be attributable to the defect, as a *prime* or material cause, the action was not maintainable. **VERMONT & ORS. v. PLYE RIVER DOCK CO., LD.** 658

8. —Landing of goods—damages 672
see **LIGHTERAGE.** 2.

NEW TRIAL—In order to obtain a new trial on the ground of surprise, it is incumbent on the party moving, to prove affirmatively and clearly, that taking the old evidence [already adduced] and the new, [sought to be adduced] together, the finding is erroneous. It is too late and dangerous to permit such party, on the argument of the rule *nisi*, to supply additional facts in support of his case.—*Semble*. If a party taken by surprise, does not, at the time, apply for a postponement on that ground, but proceeds with the trial on the evidence he possesses, he is bound by the result. **LIM KHAY CHUAN v. LIM CHOON GEK** . 534

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NOTICE ACQUIRED—Notice acquired by an agent, so as to affect his principal, need not necessarily have been acquired by the agent in the same transaction, or in course of his business for his principal; but such notice will be imputed to the principal, although acquired by the agent in a distinct transaction, and not in course of business for the principal, provided there are circumstances which satisfy the Court, that such notice was recollected by the agent, and was present to his mind at the time he subsequently acted for his principal. **KHOO KEE v. LAIGRE & ORS.** . . . 571

NOTICE BEFORE ACTION—The several provisions in the Police Act XIII. of 1856, section 112, afford no protection to police officers and others helping them, nor do they give them any right to a month's notice before action, or limit the party aggrieved to three months for bringing his action, except in cases, not only where the acts complained of are illegal, but where they were done *bona fide*, in honest ignorance,

NOTICE BEFORE ACTION—continued.

and conscientious belief that they were done in the discharge of duty, and were not done from caprice, or under a vague opinion of one's own powers. **CHH HIM & ORS. v. ROBERTSON & ORS.** . . . 131

NOTICE OF ACTION—The notice to be given under section 126 of the Conservancy Act 14 of 1856, must state the name and address of the intended plaintiff and his solicitor; it must state the time and place where the trespasses complained of, took place; and that an action is intended to be brought, otherwise the same will be bad and treated as no notice to the Commissioners. A notice headed "Notice of Action," but not otherwise intimating an action would be brought, is sufficient. **TAN KIM KENG v. MUNICIPAL COMMISSIONERS** . . . 470

2. —A notice under section 126 of the Conservancy Act 14 of 1856, which states that the defendants had, in a certain month, obstructed the plaintiff's water-course, and thereby had prevented the water flowing to the plaintiff's mill, by reason of which he had to give up working his mill, sufficiently implies that it is a continuing trespass, so as to enable the plaintiff to proceed, although the obstruction was put up a long while before. A person acquires no easement or right to the flow of water, which runs in an artificial course, although such course may be connected with a natural stream, the water of which flows into the artificial course. **TAN KIM KENG & ANOR. v. MUNICIPAL COMMISSIONERS** . . . 478

NUISANCE—The Court will, at the suit of a private neighbour restrain, by perpetual injunction, the performance of a Wyang or Chinese Theatre in a house adjoining his, so as not to be a nuisance to him. **YAHAYAH MERICAN v. KHOO HOCK LEONG & ORS.** . . . 466

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PARTNERSHIP—A partner may use the names of his co-partners in legal proceed-

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ings, and they cannot stay proceedings or get their names struck off; but the partners who object have a right to be indemnified against costs. *GAN GUAT CHUAN & ORS. v. KHO SU CHEANG* 226

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PART-PAYMENT—Since the Limitation Act [XIV. of 1859] became Law in this Colony, part-payment of principal or interest has ceased to revive a debt, if it be otherwise statute barred. A statement of accounts between the parties, in which items appear on both sides, and a balance is struck which is verbally acknowledged to be correct, does not revive the debt. The English Law on that subject is now quite inapplicable to this Colony. *MAHOMED GHOUSE v. RABIA* 214

2. —Part-payment does not take a case out of the Statute of Limitations, [Act XIV. of 1859.] The defendant's absence out of the jurisdiction does not prevent the Statute running, where he might have been served with a summons. *See* *Seable*. The provision in Act XIV. of 1840 regarding part-payment, is impliedly repealed by the provisions of the Limitation Act XIV. of 1859, which limits acknowledgments of Statute barred debts, to acknowledgments in writing. *NEOH CHIN TEK & ORS. v. TAN BEOW* 392

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PAYMENT BY INSOLVENT—In order to prevent a payment or gift made by an Insolvent on the eve of Bankruptcy, and within two months of his adjudication, voluntary,—it is not sufficient to shew merely pressure or importunity on the part of the creditor, but also that such pressure or importunity operated on the mind of the insolvent and led to the payment or gift being made. The fair conclusion to be drawn from all the cases on the subject, appears to be, that in a simple transaction, free from all suspicious circumstances, payment made by an insolvent within two months of his Bankruptcy, in the usual course of business, and in consequence of a

PAYMENT BY INSOLVENT—*contd.*

bonâ fide demand, is not a voluntary payment; but where the case is a mixed case in which, though there was pressure on the part of the creditor, there was a desire on the part of the debtor by such payment to accomplish an object of his own, which the creditor was not at the time aware of,—but to accomplish which object, the debtor seizes on the creditor's importunity as a favourable opportunity to carry out his object,—such payment will be deemed voluntary; and the money or goods paid or given under such circumstances is recoverable by the assignee from the creditor so preferred. *SMITH v. BEHN, MEYER & Co.* 101

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PRINCIPAL AND AGENT—A principal sued his agent for an account, and after getting a decree for reference, objected before the Registrar, to certain items which appeared in the agent's accounts, on the ground that he had exceeded his authority. The Registrar was of opinion, that such an objection could not be entertained by him, and by his Report reserved the items and objection for the Court. On the Report being submitted to the Court, the principal did not further press his objection, and the items were allowed as matter of course. He then sued the agent for malfeasance and misfeasance in regard to these items, and the defendant pleaded *res judicata*.—*Held*, [affirming the judgment of the Court below] that the matter was *res judicata*. The principal, in the same enquiry into accounts, cross-examined the defendant as to a certain other item in the account, but raised no objection thereto; and the Registrar, assuming the same to be correct, allowed the item. He then sued the agent

PRINCIPAL AND AGENT—continued.

for malfeasance and misfeasance in respect of this item, to which action the defendant pleaded *res judicata*.—*Held*, [by the majority of the Court, Wood, J. dissenting], that the matter in respect of this item, was not *res judicata*, as the plaintiff had neither raised, nor could he be said to have had a proper opportunity for raising an objection to it in the previous action. The above two cases distinguished from each other. A principal does not,—[in respect of an act of an agent who has exceeded his authority by making a loan, but who has obtained judgment therefor, and taken out a writ of execution against the debtor],—ratify the act of the agent, by levying on such writ, and applying the proceeds thereof, in part satisfaction of the claim. [Wood, J. dissenting]. *SHEDUMBEUM CHETTY v. ADAGAPPA CHETTY* . . . 663

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PRISONER—Release from custody by Bailiff on Civil process . . . 173

see **RELEASE FROM ARREST**.

PRIVILEGE FROM ARREST—A person who comes up from one Settlement of this Colony to another, as a witness on a *sub-pena*, is privileged in the latter Settlement from arrest on civil process, until he has had reasonable time to return to the Settlement from which he came. *Query*. Is a defendant leaving one Settlement of this Colony for another, liable to arrest under section 422 b. of the Civil Procedure Ordinance of 1878, as amended by Ordinance III. of 1880. *F. H. GOTTLIEB v. LEI. OESTER* . . . 509

PRIVITY OF CONTRACT—Goods—negligence . . . 190

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2. —B, [the plaintiff], a manufacturer of gunpowder in Scotland, sent certain large quantities of gunpowder to M. & Co. of Singapore, factors, for sale. M. & Co., on receipt of the powder, having no magazine to place it in, placed the same on board a powder hulk called the "S." belonging to K. [the defendant]: shortly after, the "S." being found to require extensive repairs, all the powder on board her, including B's was transferred on board the "P. R." another powder hulk belonging to one H., in two or three days thereafter, the "P. R." having sprung a leak, went down with all powder on board, including B's. B. [the plaintiff] then sued K. [the defendant]

PRIVITY OF CONTRACT—continued.

for the value of the powder lost to him, *firstly*, [in four counts] for non-delivery of the powder as on a contract of bailment, *secondly*, [5th count] for negligence, as a bailee of the powder from the plaintiff, *thirdly*, [6th count] for negligence as bailee of the powder belonging to the plaintiff, *fourthly*, [amended 7th count,] for trover of the powder.—*Held*, the plaintiff could not maintain the action on either count, not on the first four counts, as there was no privity of contract between B, the plaintiff, and K, the defendant,—not on the 5th count as K, the defendant, never received the powder from B, the plaintiff, and owed him no duty to safely keep the powder,—not on the sixth count, as the owners and crew of the hulk "P. R.," in which the powder went down, were not the servants and agents of K, the defendant,—and not on the 7th count, as even if there was negligence on the part of K, the defendant, still there was no evidence, on above facts, of a conversion by him of the powder. *BUCHANAN v. KIRBY* . . . 230

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PROMISSORY NOTE—A promissory note [in Malay characters] payable to a person, or the agent of such person, is to be taken as payable to such person or bearer, and is negotiable and can be pleaded as a set off. *SHAIK EBRAHIM BIN ALLEE v. COHEN* . . . 242

2. —**Surety** . . . 350

see **BREACH OF AGREEMENT**.

3. —It is now settled law, that the holder of a joint, or joint and several bill or promissory note is, in dealing with it, affected by knowledge acquired, even after taking the bill or note, as to which of the parties liable is principal and which is surety. Giving of time to the principal under such circumstances, for valuable consideration, but without the surety's knowledge, operates to discharge the surety. If the surety under these circumstances is aware of the fact of time being given, but does not dissent from it, he will not be discharged. A creditor in giving time under such circumstances to the principal, without the surety's consent, may, also without the surety's consent, nevertheless, reserve his rights against the surety, and he will not be discharged. **CHARTERED MERCANTILE**

PROMISSORY NOTE—continued.**BANK OF INDIA, &C., v. LETCHMAN CHETTY & ANOR.** 455

4. —Affixing chops in lieu of signature sufficient 536

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5. —A promissory note made and stamped under the Stamp Ordinance 8 of 1873, but having such stamp cancelled only with the maker's name, is not admissible in evidence under section 9, sub-section 3 of the Stamp Ordinance 1881; nor under the repealed Ordinance 8 of 1873, under which it was made. The fact that the action, on the note, was commenced when the Ordinance of 1873 was still in operation, and that such Ordinance was repealed *pendente lite*, makes no difference.—**PALANIAPAH CHETTY v. LIM POH** 548

PROPERTY—Sale of,—mortgage—lis pendens 383*see* LIS PENDENS.

PUBLIC OFFICER—An action for damages will lie against a public servant, for acting in breach of his official duty, to the injury of any person. The defendant, the Master Attendant or Shipping Officer at Singapore, it was alleged, refused to place the plaintiff, a duly qualified seaman, on the articles of a merchant vessel, as chief officer, whereby the plaintiff was unable to get the berth and suffered great loss.—*Held*, [if the evidence had supported the case,] that the action would lie. The defendant advised the captain of a ship, who was about shipping the plaintiff as his chief officer, not to take him as such, on account of his previous conduct on board other ships, whereupon the captain changed his mind, and would not take plaintiff on.—*Held*, this was not an obstructing of the plaintiff from being engaged; and even if it was, was not done by the defendant in breach of his public duty, as it was no part of his public duty to advise the captain.—*Held*, further, if the plaintiff had any remedy for such statement made by the defendant, concerning him, to the captain, it was in a different form of action. *Query*. Whether an action for slander or libel would lie, under the circumstances? The duty of the Shipping Officer under section 4 of the Merchant Shipping [Indian] Act 1 of 1859, is not to facilitate engagements for seamen generally, but only in the way pointed out by section 22; and that is, not in assisting them to get employment, but to see they were not imposed on, when employment was offered them. **COLLINS v. BURN** 186

2. —The assignment by a public officer in the service of the Government of the

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Colony, of his stipend to another, to secure re-payment of a loan, is contrary to public policy and illegal. **SHELLUMBRUM CHETTY v. JONES** 204

3. —The plaintiff and defendant were Magistrates of Province Wellesley, the plaintiff being relieved by the defendant in that office. A sum of money was due the plaintiff by Government, for salary, transport and other charges, which the plaintiff requested the chief clerk to receive and remit to him at Singapore. These monies passed through the hands of the defendant, who allowed the chief clerk to receive same, but never enquired if he had remitted them till it was found the clerk had embezzled same.—*Held*, the defendant was not liable to the plaintiff for the amount. *Semble*. Money had and received is not the proper form of action for such a claim. The plaintiff should have stated the facts, and alleged that a duty was cast on the defendant, to see to the proper remitting of the money; but under the circumstances of the case, no such duty, or neglect of duty on the part of the defendant, was shewn. **F. H. GORTLIB v. D. F. A. HERVEY** 505

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RELEASE FROM ARREST—The release of a prisoner taken into custody on civil process, though permitted by the bailiff, does not debar the plaintiff from re-arresting him, unless the plaintiff has consented to, and ratified the act of the bailiff. *Regina v. Renton*, 2 Exch. 216, remarks of Parke B. observed on. The fact that the bailiff so releasing, is a *special* bailiff of the plaintiff, makes no difference in this respect. **CHARTERED MERCANTILE BANK v. D'RODAS** . . . 173

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3. —Letting from month to month—lease—practice . . . 637
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2. —Dedication, so as to constitute a public right-of-way, will not be presumed, unless the facts of the case are such as to shew that the owner of the soil intended to do so. User alone, for however long a period, is not conclusive on the point; it may be rebutted by shewing that the state of the title was such that dedication was impossible, or by facts shewing that the owner had no such intention. A landing-place from the seaside to a highway, is *prima facie* also a highway; but the presumption is not absolutely necessary, and may be rebutted as above stated. Trustees of land for a special purpose have no power to dedicate it as a highway. A private right-of-way over land granted for a special purpose, will be presumed after user for several years, where its user as a private right-of-way, would not be inconsistent with the purposes for which the land was granted. The formation and constitution of the municipal body considered. **MUNICIPAL COMMISSIONERS v. TOLSON** . . . 277

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ROADS AND BRIDGES—The Municipal Commissioners are bound, both by law and by the terms of the Conservancy Act 14 of 1856 as amended by Ordinance 2 of 1879, to uphold all public roads and bridges and keep them in proper repair: and in omitting to do so and allowing them to remain in a state of disrepair, they are liable to an indictment for causing a nuisance to the public, as well as to an action by any person who may sustain direct and particular damage, for such breach of duty on their part. Where a duty is imposed by law or Statute on a person or body of persons, they do not release themselves from discharging that duty, or free themselves from liability in respect thereof, by

ROADS AND BRIDGES—continued.

handing it over to another to perform it. The defendants, whose duty it was to uphold and repair public roads and bridges, gave the work on contract to a third party. One of such bridges, for want of proper repair, gave way, whereby plaintiff's horse was injured.—*Held*, that it was the duty of the defendants to uphold and repair the bridge, their letting the work out, did not free them from liability for the negligence of the contractor, in not properly repairing the bridge. **PATERSON v. MUNICIPAL COMMISSIONERS** 561

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SCIRE FACIAS—In a case of *scire facias* to revive a judgment, it is too premature and irregular to arrest the defendant before the time allowed by the *scire facias* to shew cause, has expired, and the defendant will be discharged from custody. If judgment is recovered against two, and one shortly after, is adjudicated insolvent, and the judgment is thereafter sought to be revived, the *scire facias* need not issue against the insolvent judgment-debtor, but only against the other. *Semble*. If the rule, in a motion to set aside proceedings for irregularity, is made absolute, and nothing is said about costs in the motion paper, costs will not be allowed. *Query*. Do the rules of Court in England and the Statute 13 Edw. I. c. 45 [West 2], extend here? **CHAN GUAN TAK v. CHIN KIM FAT & ANOR.** 274

SEA-WORTHINESS—In all questions of sea-worthiness, the law of the country to which the ship belongs, must prevail. In order to constitute deviation, there must be a voluntary act on the part of those on board, to turn out of the course: and any going out of that course, which is attributable to ignorance, or tide, or weather, is not a deviation. **VERAPPA CHETTY v. VENTRE** 174

SECT—A Shafi female who has arrived at puberty, may lawfully renounce the tenets of that sect, and embrace those of the Hanifa. According to the Hanifa sect, a girl who has arrived at puberty, is legally emancipated from all guardianship, and is at liberty to marry whom she chooses, whether her equal or otherwise. An Arab Shafi female, having arrived at puberty, was desirous of marrying a Kling Mohamedan; her Guardian or Wali, refused to consent to the marriage, on the ground, that she being an Arab, and so considered of a superior caste, could not marry any

SECT—continued.

person other than of her own nationality. The girl went through the ceremony of marriage with the man, without her guardian's consent, and the guardian obtained an injunction from this Court, restraining the consummation of the marriage. On a first motion to dissolve the injunction, the Court refused to do so, the girl being then still a Shafi, according to which sect a virgin could not contract marriage at any age, without her guardian's consent. The girl then renounced the tenets of the Shafi sect, and embraced those of the Hanifa, and then renewed her application.—*Held*, that her change of sects was valid; and, as a Hanifa, she being of the age of puberty, was emancipated from all guardianship, and at liberty to marry whom she chose, and the injunction was dissolved with costs. **Muhomed Ibrahim v. Gulam Ahmad**, 1 Bom. H. C. Rep. 239, followed. **SALMAH & ANOR. v. SOOLONG** 421

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SERVANT—The term "servant" in clause 2, section 1 of the Limitation Act 14 of 1859, applies to domestic or menial servants only—and is not applicable to a claim for wages by the supercargo or nacodah of a ship. The limitation of 3 years, under clause 9 of section 1, is the limitation applicable to such a claim. **LIM PEK TEE v. LIM TEET & ORS.** 479

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SLANDER—A declaration that the plaintiff was the Colonial Surgeon of this Settlement, and as such had charge of and was responsible for the good management, order and conduct of the General Hospital at Penang and the Hospital at Butterworth, Province Wellesley, and for the proper medical treatment of the patients therein, and that the defendant, with intent to injure the plaintiff, falsely and maliciously spoke and published of the plaintiff, in relation to the General Hospital, the words following:—"It stunk; it stunk," and averring in an innuendo, that the defendant thereby meant that the General Hospital was so badly and negligently managed and conducted under the plaintiff, that the Hospital stunk, whereby the plaintiff was injured in his reputation as a medical man, and in his office of Colonial Surgeon in charge of the Hospital—and with the like intent, also falsely and maliciously spoke and published of the plaintiff in relation to the Hospital at Butterworth, the words following: "People are sent in "curable, and sent out incurable," and averring in an innuendo, that the defendant thereby meant that patients were sent to that Hospital curable, but owing to the negligence and unskilful treatment they received there, they were sent out incurable, whereby the plaintiff was injured as before—sufficiently avers that the words spoken, were spoken of the plaintiff; and not, as a matter distinct from any direct imputation of blame attaching to him. The above words were spoken by the defendant in the presence of the plaintiff, and several other gentlemen, in reference to the general state of and matters connected with these public Hospitals: no express reference was made to the plaintiff therein.—*Held*, the communication was privileged, and in the absence of actual malice, an action did not lie therefor. *VEITCH v. DE MORNAY* - 418

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STAY OF ACTION—The Court will not stay an action on a covenant in a mortgage bond, until after the hearing of an equity suit, brought by the defendant against the plaintiff, to have such bond cancelled, as having been obtained, by fraud. *SHEDUM-BRUM CHETTY v SHAGAPAH CHETTY* 467

2.—The Court stayed an action in ejectment, on the ground that a suit in Equity was pending,—in which the same point was in question and in which suit a decree for accounts had been made—until the finding and report on such account—but ordered the defendant to give the plaintiff, security for payment of the rent of the property, [the subject of the ejectment,] accruing during the pendency of such suit in Equity. *HASHIM NINA MERICAN v. KHATIJAH BEE & ORS* 635

STAY OF EXECUTION—The Court refused to stay execution in a suit, or order the defendant therein to pay into Court a portion of the amount of judgment, on the application of a plaintiff in another suit, and a creditor of the plaintiff in the first, although it was alleged that the plaintiff in the first suit was insolvent. *GOLAM KADEE v. SHAGAPAH CHETTY* 512

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2. —Whether a tenant, who holds for a term of years, and after the expiration of the lease continues to do so, paying rent for his holding, is a tenant from year to year or otherwise, is a question of fact to be gathered from the circumstances; but ought to be such a tenant as is just and fair between the parties. The leaning of authorities is however in favor of the presumption of the tenancy being from year to year; and the reason for this, is founded mainly on common sense and justice. Neither the practice in this Colony to let from month to month,—nor the fact that by the former lease, rent is reserved not by the year, but by the month,—rebuts the presumption. *SYED MAHOMED ALSAGOFF v. MAX BEHR* 637

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TITLE TO GOODS—Attachment—equitable mortgage of personality— 553

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TRADE-MARK—*Semble*. The Registration of Trade-Marks Act, 38 & 39 Vict., c. 91, does not apply to this Colony: and section 6 of the Civil Law Ordinance IV. of 1878, which extends to this Colony mercantile law generally as it is in England, has no reference to so specific and exceptional a subject. A trade-mark may be acquired in this Colony, under the common law, and independently of the statute above-mentioned. The fact that the registered owner of a trade-mark, in addition to the registered mark, has other marks and figure about it, as mere adjuncts thereto, does not deprive him of his right to such registered mark, or prevent his suing a person who copies

TRADE-MARK—continued.

such registered trade-mark. The measure of damages for copying a trade-mark, is the amount of injury done to the plaintiff, by the illegitimate trade practised therewith by the defendant. *VULCAN MATCH Co. v. HERM. JENSEN & Co.* . . . 650

TRANSFER OF PROPERTY—Third-party—fraud—Execution-Creditor . . . 64

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TRANSFER OF RIGHT TO SUE—Trustee—next-of-kin . . . 624

see EJECTMENT. 3.

TRANSLATION OF WILL—Probate—Evidence . . . 454

see WILL.

TREATY—Construction of—Evidence 520

see EVIDENCE. 4.

TRESPASS—Judgment in action of f.—title to freehold in issue—estoppel . . . 242

see EJECTMENT. 1.

2. —An action for trespass and false imprisonment, the defendant pleaded a former acquittal for the same causes of action by the Police Magistrate.—*Held*, on demurrer, that the plea was bad, as the Statute 9, Geo. IV., c. 31, does not extend to this Colony. A Constable who arrests and imprisons a person who enters into a police station in an intoxicated state, and creates a disturbance therein, is justified in so doing, although he acted without a warrant, by the 86th section of Act XIII. of 1856 and 22nd section of Act XLVIII. of 1860. The plaintiff having recovered judgment on the first count, and the defendant on the second count, the Court, by virtue of sections 102 of Act XIII. of 1856, and 29 of Act XLVIII. of 1860, allowed the defendant his full costs against the plaintiff, but refused to allow the plaintiff any costs. The plaintiff having demurred to the plea of the defendant [a police officer], and the demurrer being allowed, he was allowed his full costs of such demurrer against the defendant. *MAHOMED ALLY v. SCULLY* 254

3. —Obstruction—Easement or right to flow of water . . . 478

see NOTICE OF ACTION. 2.

TROVER—The plaintiff, the Editor of a weekly paper, sued the defendant, the Deputy Postmaster of Malacca, in trover, for the detention of certain journals and parcels addressed to him as such Editor. The defendant pleaded and proved, that he detained such letters and parcels by order of the Resident Councillor, until the person to whom they were addressed, declared in writing, the name of such Editor.—*Held*, the defendant was justified in so detaining the journals and parcels. The defendant was aware the plaintiff was the Editor of

TROVER—continued.

such paper, and had always, theretofore, forwarded him all letters and parcels addressed to the "*Editor*," and was present, in company with the Resident Councillor, on a previous occasion, when the plaintiff in open Court, avowed himself the Editor.—*Held*, these facts in no way deprived the defendant of his justification. *EDWARDS v. WESTERHOUT* . . . 31

TRUST—A testatrix made over to her executors "as such," all her estate "but in trust always for the purposes hereinafter mentioned." She then disposed of various portions of the estate, and directed her executors to collect the remainder, and to apply and distribute the same, all circumstances considered, in such manner as to them appeared, just.—*Held*, there was no gift to the executors individually, but only upon trust; and inasmuch as the objects were not declared, the trust was void, and the property comprised therein went to the next-of-kin. The testatrix also directed that the upper story of a certain house should be neither mortgaged nor sold, but kept as "a family residence." No time was mentioned during which the house was so to be kept, nor was the word "family," defined.—*Held*, the gift was void for uncertainty, and as tending to a perpetuity. The testatrix also left four houses upon trust, to rent the same to two of her executors, for the period of 40 years at \$100 per annum, and to renew the lease from time to time.—*Held*, the trust was a good one. She also directed a sum of \$50,000 should be lent to the said two executors for the term of 40 years, at 5 per cent. per annum, and to renew the loan from time to time: the interest she declared, should form part of her residuary estate.—*Held*, the trust was a good one. She also directed that certain property should be held on trust, to allow one Lim Ah Yong to reside thereon, free of rent for 40 years, and that after that period, the property was to become his, or his heirs.—*Held*, that the said Lim Ah Yong had simply a license to live in the premises, and the gift over was bad, as violating the law against perpetuities. She directed certain plantations to be reserved as a family burial-ground, and that the same was not to be mortgaged or sold.—*Held*, the gift was void as tending to a perpetuity. She also directed that a certain house was to be built on a portion of these plantations, to be called the "Sow Chong," and in which, religious ceremonies to the dead were to be celebrated.—*Held*, the trust was void as being a perpetuity, and not a charity. Evidence of reputation of two persons being husband and wife, even among Chinese, is

TRUST—*continued.*

admissible on a question of marriage or no marriage, and is evidence of such marriage. The above decisions, on appeal, affirmed by the Privy Council. **ONG CHENG NEO v. YEAP CHEAH NEO & ORS.** . . . 326

TRUSTEE OF CHARITY—*see* Devise 616
see DEVISE. 1.

TRUSTEES OF LAND—Power to dedicate—high-way . . . 277
see RIGHT-OF-WAY. 2.

TRUSTEESHIP—When one and the same person is appointed executor and trustee under a Will, his executorship ceases, and his trusteeship commences on the estates vesting in him [by virtue of the Will and his assent to the devise.] subject to the specific trust declared by the Will. This Court is bound by the Letters Patent of 1855, to allow a reasonable commission to an executor, [out of the testator's estate,] for his "pains and trouble" in administering the same; but there is no fixed rule to allow him 5 per cent. on the amount of the assets, whether there be appreciable trouble or not. The rate of commission might be even greater or less, according to the nature of the estate administered and the trouble and pains necessarily taken by the executor: the amount of assets has little to do with it. In the case of a testator dying perfectly solvent, with a balance of ready money in hand, and having devised his real estate specifically among certain devisees, the executor's pains and trouble would be so trifling, that 5 per cent. commission to him would not be just or reasonable. The fixed rate in India, of 5 per cent. on receipts and payments, is not binding here, inasmuch as the incidents of an executorship in India and this Colony, are not the same. Here he succeeds to real estate under the Act XX. of 1837. **WANCHEE INCHEH THYBOO & ANOR v. GOLAM KADER** . . . 611

USAGE OF TRADE—In order to establish an usage of trade, the evidence of men personally connected with the trade, and who have acquired their knowledge of its usage, not from hearsay, but from experience, is required. There is no usage of trade, applicable to Straits trading vessels trading between Singapore and Penang, which permits of their touching in at Malacca, so as not to render it a deviation, when such vessel is insured only "for voyages between Singapore and Penang." Straits owned vessels, plying between the Straits and ports outside the limits of the Colony, are not "Straits Traders," so as to be affected by Straits usage in trade. **ARMOOGUM CHETTY v. LEE CHENG TEE & ANOR.** . . . 181

USER—Public right-of-way—title . . . 277
see RIGHT-OF-WAY. 2.

VALUE—Annual,—for purposes of assessment . . . 51

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VENDOR—Action for non-completion of purchase—title . . . 654

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VENDOR AND VENDEE—Failure of consideration—*maxim caveat emptor* . . . 167

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VESSELS—Straits owned—Straits traders . . . 181

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WAGES—Claim of,—domestic or menial servant,—limitation . . . 479

see SERVANT.

WAKOFF—Direction by testator as to rents and profits of, held good . . . 255
see ENGLISH LAW. 3.

2. —Land set aside as,—for burial-ground of donor and family, held void . . . 324
see LAND. 7.

3. —A devise of a shop as a Wakoff, which was not to be sold, but its rents to go for its repairs, and the balance thereof for Kandoories for the testator's benefit, is void as being in restraint of alienation, and tending to a perpetuity. Such a clause, though void from the moment the Will takes effect, is still not beyond the right of the next-of-kin to call in question; though for several years they may have acquiesced in it, and make no claim to have same set aside, for more than 12 years from the time the Will first operated. The trustees of the shop, for the purpose of Wakoff and Kandoories, do not cease to be trustees, merely because such devise is void: they hold it as trustees for that purpose until the devise is held void, and thereafter, in trust for the next-of-kin. The case falls within section 2 of the Limitation Act XIV. of 1859, and is not barred by limitation. **MUSTAN BEE & ORS. v. SHINA TOMBY & ANOR.** . . . 580

4. —*see* also CHARITY. 3. . . 489

WAREHOUSEMEN—A warehouseman who undertakes to warehouse goods in a ship, impliedly undertakes to use due care in keeping the ship in good condition and reasonably water-tight; and also to have a sufficient number of hands on board to answer any emergency. The fact that the warehouseman has placed such a number of hands on board, as is ordinarily to be found in other vessels, used for the same purposes, does not, of itself, relieve him from the responsibility, should the goods entrusted to him be lost. Nor is he relieved

WAREHOUSEMEN—continued.

from responsibility by the fact that he has placed a reasonably sufficient number of men on board with express directions that they were not to be absent from the ship, and the men, in spite of his directions, wilfully absent themselves, leaving so few hands on board as to be unequal to meet an emergency. The defendants, the owners of a hulk, received, for reward, certain quantities of gunpowder from the plaintiffs to be warehoused on board their hulk, they placed a European captain and four native seamen on board her, with express directions they were not to be absent from the hulk at nights, three of whom, however, on the night in question, disobeyed the order given them, leaving two only of the men [natives] on board: the number of hands so placed by the defendants was the customary number placed on board other hulks similarly used. The hulk after taking in an extra quantity of gunpowder than usual, on the night in question, sprang a leak and sank with all gunpowder on board.—*Held*, the defendants were guilty of negligence, and liable to make good to the plaintiffs the value of gunpowder received from them. The defendants' hulk, on the day of the night in question, took in certain quantities of gunpowder belonging to the plaintiffs from another hulk, but without the privity of the plaintiffs, and that night sank as stated above.—*Held*, the plaintiffs could not sue the defendants for negligence in respect of this quantity, as there was no privity of contract between them. **MARTIN, DYCE & Co. v. HODGSON & Co.** . . . 190

WARRANTY—The Plaintiff bought 158 slabs of tin of the defendant, and at the time noticed that 137 slabs bore the chop of the defendant's firm, but the remaining 21 bore the chop of another firm—and so remarked to the defendant. The defendant in reply said, "all the tin that goes out of my shop is good." The plaintiff took delivery of the tin, paid the full price for the 158 slabs, and conveyed the same to Singapore. There he discovered that the 21 slabs were spurious, being a mixture of tin, and other inferior metal. He brought the slabs, or such portion thereof as had not been resmelted at Singapore, to Penang and claimed of the defendant, a return of his purchase money in full, as for a breach of warranty. The defendant, having satisfied himself that the 21 slabs were spurious, tendered the plaintiff the price paid for same, which the plaintiff declined to receive, and commenced this action.—*Held*, 1stly, the words "all the tin that goes out of my shop is good," amounted to an express warranty that the tin was pure and merchantable; and 2ndly, that the warranty

WARRANTY—continued.

was general, and applied to the whole 581 slabs; and being entire, though it only partially failed, the plaintiff was entitled to recover back the whole of his purchase money. General observations on warranties, in commercial matters. **KHO CHIN JAN & ANOR v. LIM TOW & ORS.** . . . 22

2. —Implied—sale of goods . . . 667
see **CAVEAT EMPTOR.** 2.

WATER—Right to flow of,—stream—artificial course . . . 478
see **NOTICE OF ACTION.** 2.

WAY—Plea claiming right of . . . 272
see **RIGHT-OF-WAY.** 1.

WAYANG—Perpetual Injunction . . . 466
see **NUISANCE.**

WHARFAGE—Plaintiff was the charterer of a ship, which he chartered at 24 sh. per keel, "in full of all charges, wharfage and "other dues," and loaded her with a cargo of coal for Singapore. He contracted to sell the coal to defendant, at 36 sh. per ton to be "delivered alongside any craft, floating "depôt, steamer or wharf, as buyers may "direct, and in full of all charges." On the ship's arrival at Singapore, the defendant, [the purchaser] directed that she should go alongside the Borneo Company's Wharf, which she did, and there delivered her cargo of coal which was received by the Company on the defendant's account, and warehoused by them. The Company charged the defendant with [among other things] wharfage, which he paid and subsequently claimed to deduct [and retained] from the price of the coals to be paid the plaintiff, alleging that by the terms of the contract, he [plaintiff] was liable therefor: the plaintiff refused to submit to this and commenced an action for the recovery of the amount retained.—*Held*, that the plaintiff was not liable for the wharfage, as on the true construction of the contract, the words "in full "of all charges" meant, that the ship [plaintiff] could make no charge which it might otherwise have been entitled to, such as labour for taking the coal out of the hold, harbour dues, &c., and not that the ship-owners or charterer would defray expenses, falling immediately on the purchaser, [defendant] by his voluntary act.—*Held*, further, that wharfage is a charge on the shipper or consignee of goods, and not on the ship, and so property fell on the defendant.—*Held* also, that the contract of sale, though annexed to the charter-party, could not be construed in conjunction with the latter, and the expression in the latter, "full of all . . . wharfage" did not explain the words "in full of all charges" in the contract of sale. **CHALLIS v. CRAMER** 227

WHARFINGER—Warehouse—Implied contract 461

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WIFE'S PROPERTY—Real and personal—right-of-action against husband . 622

see HINDOO LAW.

WILL—The Court is not bound by the translation of a Will, which is attached to the Probate, if such translation is incorrect—but may look at the true translation, and go into evidence to find what the true translation is. Probate is granted by the Superior Courts to the Will of a Testator and, not to the translation of same, although made by the Interpreter of the Court. LIM MAH YONG v. J. A. ANTHONY & ORS. 454

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WRIT OF ARREST—Where a defendant
 has been arrested under a writ of arrest, and
 it is intended to have him discharged from
 custody, on account of some defect in the

WRIT OF ARREST—continued.

proceedings,—the application, or the rule
nisi, should be to set aside the order grant-
 ing the arrest, and not the writ only. The
 Court, however, has no power under section
 9 of the Ordinance 5 of 1878, to order the
 application, or rule *nisi*, to be amended ac-
 cordingly. A plaintiff, *bona fide* intending
 to negotiate with defendant about certain
 business in pursuance of an offer to that
 effect on the part of the defendant, request-
 ed the defendant to come to Penang for that
 purpose. The defendant came. Owing to
 the defendant's conduct, the negotiation
 fell through, and the defendant thereupon
 was about to return to his country when
 the plaintiff, without any fraud, caused him
 to be arrested for a debt, altogether inde-
 pendent of the other business.—*Held*, he was
 not at liberty to do so; and inasmuch as,
 but for such the defendant's presence in
 the Colony, the Court had no jurisdiction
 to entertain the suit, the order of arrest,
 the writ of summons, and all subsequent
 proceedings, were set aside.—*Semble*. A
 foreign Sovereign Prince is not exempt
 from the jurisdiction of the Courts of this
 Colony, unless he is recognized as such,
 by the British Crown. **LIM GUAN TEET
 v. TUNKU AROBE** 539

WRIT OF SUMMONS—Where it appeared
 that the plaintiff was unable to serve a
 writ of summons on a defendant out of the
 jurisdiction, owing to the great expense
 which would necessarily be attendant there-
 on, without a likelihood of his being repaid
 —the Court ordered a renewal of the writ,
 although it was not stated that the claim
 was not barred by Limitation. Inability to
 serve a writ of summons, owing to pecu-
 niary reasons, is a "good reason" within
 the meaning of section 44, Ordinance 5 of
 1878. **Doyle v. Kaufmann** [3 L.R. Q.B.,
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Ex. 1. (N. S.)
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